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DECISIONS
OF THE DEPARTMENT OF THE INTERIOR
IN
CASES RELATING TO
THE PUBLIC LANDS

EDITED BY GEORGE J. HESSELMAN

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DECISIONS
OF THE DEPARTMENT OF THE INTERIOR
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WILLIAM H. HAY
DIRECTOR

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DECISIONS
RELATING TO
THE PUBLIC LANDS.

COEUR D'ALENE INDIAN LANDS—TIME OF PAYMENT EXTENDED.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 2, 1912.

REGISTER AND RECEIVER,
*United States Land Office,
Coeur d'Alene, Idaho.*

SIRS: Your attention is directed to the act of Congress approved April 15, 1912 (Public, No. 120), which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has heretofore made a homestead entry for land which was formerly a part of the Coeur d'Alene Indian Reservation, in the State of Idaho, authorized by the act approved June twenty-first, nineteen hundred and six, may apply to the register and receiver of the land office in the district or districts in which the land is located for an extension of time within which to make payment of any amount that is about to become due, and upon the payment of interest for one year in advance, at five per centum per annum upon the amount due, such payment will be extended for a period of one year, and any payment so extended may annually thereafter be extended for a period of one year in the same manner: *Provided*, That the last payment and all other payments must be made within a period not exceeding one year after the last payment becomes due by the terms of the act under which the entry was made; that all moneys paid for interest as herein provided shall be deposited in the Treasury to the credit of the Indians as a part of the proceeds received for the lands.

SEC. 2. That failure to make any payment that may be due, unless the same be extended, or to make any extended payment at or before the time to which such payment has been extended as herein provided, will forfeit the entry and the same shall be canceled, and any and all payments theretofore made shall be forfeited.

SEC. 3. That nothing herein contained shall affect any valid adverse claim initiated prior to the passage of this act.

Approved, April 15, 1912.

No special form of application for extension of time to make payment will be required; the payment by the entryman of interest for one year in advance, on any amount about to become due, at the rate of five per centum per annum, will be sufficient, and the receiver will note, upon receipts and abstracts of collections, the nature and purpose of the payment.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

RECLAMATION—BELLE FOURCHE PROJECT.

PUBLIC NOTICE

DEPARTMENT OF THE INTERIOR,
Washington, May 2, 1912.

Pursuant to the provisions of section 4 of the Reclamation Act of June 17, 1902 (32 Stat., 388), notice is hereby given as follows:

1. Water will be ready for delivery from the third unit of the Belle Fourche Project, South Dakota, under the provisions of the Reclamation Act, in the irrigation season of 1912, for the irrigable areas shown on farm unit plats of—

Black Hills Meridian

T. 9 N., R. 4 E.
T. 10 N., R. 4 E.
T. 8 N., R. 5 E.
T. 9 N., R. 5 E.
T. 10 N., R. 5 E.
T. 7 N., R. 6 E.
T. 8 N., R. 6 E.
T. 9 N., R. 6 E.
T. 7 N., R. 7 E.

approved by the Secretary of the Interior on March 27, 1912, and on file in the local land office at Belle Fourche, South Dakota.

2. Homestead entries accompanied by applications for water rights, and, as hereinafter provided, by the appropriate installment or installments of the charges for building, operation and maintenance may be made on and after May 25, 1912, beginning at 9 o'clock A. M., under the provisions of said act, for the farm units shown on said plats. Water-right applications may be made after the date hereof

for lands heretofore entered and for lands in private ownership, and the time when payments will be due therefor is hereinafter stated.

3. Warning is hereby expressly given that no person will be permitted to gain or exercise any right whatever under any settlement or occupation begun prior to June 20, 1912, on any lands shown on said plats; provided, however, that this shall not interfere with any valid existing rights obtained by settlement or entry while the land was subject thereto.

4. The limit of area per entry representing the acreage which, in the opinion of the Secretary of the Interior, may be reasonably required for the support of a family on the lands entered subject to the provisions of the Reclamation Act, is fixed at the amounts shown on the plats for the several farm units. The maximum limit of area for which water-right application may be made for lands in private ownership shall be 160 acres of irrigable land for each land owner.

5. The lands included in this unit, and shown on the above-named farm unit plats shall be divided into four classes: A, B, C and D, and shall be subject to the charges and terms of payment as hereinafter prescribed.

6. Class A includes all public lands in this unit entered on or before January 24, 1911, and all such lands in private ownership, held under trust deed or signed under contract with the Belle Fourche Valley Water Users Association on or before said date.

Lands in Class A shall be subject to a building charge of \$30 per acre of irrigable land, graduated as follows: First installment, \$1 per acre; second installment, \$2 per acre; third to eighth installments, inclusive, \$3 per acre; ninth installment, \$4 per acre; and tenth installment, \$5 per acre. The first installment shall become due on December 1, 1912, and subsequent installments on December first of each year thereafter.

In case of failure to file water-right application within two years from the date of this notice, or to pay the annual installments required by this public notice and orders applicable thereto, the land shall be subject to the building charge and conditions of payments hereinafter imposed upon lands in Class C.

7. Lands in Class A may, upon application, be transferred to Class B hereinafter described, and become subject to all charges, terms, limitations and conditions applicable thereto. Such applications, if approved by the project engineer, shall be filed in the local land office.

8. Class B includes all lands which would be included in Class A, except for the fact that the entryman or owner of the land desires to take advantage of the graduated scale of payments, as hereinafter provided. Lands in Class B shall be subject to a building charge of \$35 per acre of irrigable land, graduated as follows:

First to third installments, inclusive, \$1 per acre; fourth and fifth installments, \$2 per acre; sixth installment, \$3 per acre; seventh installment, \$4 per acre; eighth installment, \$5 per acre; ninth installment, \$6 per acre; and tenth installment, \$10 per acre. For Class B lands the first installment shall be due on December 1, 1912, and subsequent installments on December first of each year thereafter.

9. Class C includes all public lands in this unit vacant on and after January 24, 1911, and all lands in private ownership which on the said date were not held under trust deed, or were not signed under contract with the Belle Fourche Valley Water Users Association. Lands in Class C shall, until further notice, be subject to a building charge of \$40 per acre of irrigable land, payable in graduated installments as follows:

First and second installments, \$2 each per acre; third and fourth installments, \$3 each per acre; fifth and sixth installments, \$4 each per acre; seventh and eighth installments, \$5 each per acre; ninth and tenth installments, \$6 each per acre.

For public lands in this class entered on or after January 24, 1911, and also for private lands in this class, the first two installments shall be paid at the time of entry and filing of water-right application; the third installment shall be due December 1 of the following year, and subsequent installments shall be due on December first of each year thereafter.

10. Class D includes all lands in this unit now or hereafter owned by the State of South Dakota, and they shall be subject to the charges, limitations, terms and conditions as for lands of Class A, if water-right application be made within two years of the date thereof. All lands in Class D for which water-right application shall not have been made within the said period of two years, shall become subject to the charges, conditions and limitations imposed upon lands in Class C.

11. The charges which shall be made per acre of irrigable land in the said entries and for lands heretofore entered or in private ownership which can be irrigated by the waters from the said irrigation project are in two parts as follows:

(a) For the building of the irrigation system, the amounts stated as applicable to the various classes of lands described, payable in not more than ten annual installments. Full payment may be made at any time of any balance of the building charge remaining due subject to the regulations of the General Land Office.

(b) For operation and maintenance for the irrigation season of 1912 and annually thereafter, until further notice, shall be 60 cents per acre of irrigable land, whether water is used thereon or not. For all lands in Classes A and B the portions of the installments for operation and maintenance shall be due December 1, 1912, and

annually on December first of each year thereafter, whether or not water-right application is made or water is used thereon. For lands of Class C the portion of the first installment for operation and maintenance shall be paid at the time of entry or filing of water-right application; the portion of the second installment shall become due on December first of the following year, and subsequent portions on December first of each year thereafter.

12. The regulation is hereby established that no water will be furnished in any year until the portion of the installment for operation and maintenance for that irrigation season and for prior seasons shall have been paid. Accordingly, no water will be furnished for the irrigation season of 1912 for any lands unless the portion for operation and maintenance of the installment due December 1, 1912, or at the time of entry and filing of water-right application has been paid; and in like manner for subsequent years, no water will be furnished to lands until payment of said portion of the installment is made for the current and prior years. As soon as the data are available the portion of the installment for operation and maintenance will be fixed in proportion to the amount of water used, with a minimum charge per acre of irrigable land, whether water is used thereon or not.

13. A number of farm units and tracts of private lands are so situated as to be irrigable partly under the second unit, opened to irrigation by public notice of February 10, and partly under the third unit, and water-right applications have heretofore been filed for the areas under the second unit. In such cases both areas are shown distinctively on the plats and the added areas, irrigable in 1912, will be subject to all the terms and conditions of this notice, water-right applications being filed therefor as for other irrigable lands in the third unit.

14. Failure to make any two payments when due, whether on entries made subject to the Reclamation Act, or on water-right applications for lands in private ownership, shall render the water-right applications in either case, and, if the lands are public lands, the entries also, subject to cancellation, with the forfeiture of all rights thereto under the Reclamation Act, as well as of any moneys paid.

15. An entryman against whose entry there is no pending charge of non-compliance with the law or regulations, or whose entry is not subject to cancellation under the Reclamation Act, may relinquish his entry to the United States and assign in writing to a subsequent entryman any credits he may have for payments made on his water-right application; and such assignee shall have the right to continue payment at the same building charge. A private land owner against whose water-right application there is no pending charge of non-compliance with the law or regulations, or whose water-right appli-

cation is not subject to cancellation, may in like manner make written assignment of credits for payments made, and his assignee shall have the right to continue payment at the same building charge. No benefit of a smaller charge than that fixed by the public notice in force at the time of filing water-right application shall accrue for any land, except where the entryman or private owner holds written assignment made under the conditions herein stated.

16. All charges must be paid at the local land office at Belle Fourche, South Dakota.

SAMUEL ADAMS,
First Assistant Secretary of the Interior.

RECLAMATION—BELLE FOURCHE PROJECT.

ORDER.

DEPARTMENT OF THE INTERIOR,
Washington, May 2, 1912.

By virtue of the authority contained in the act of Congress approved June 17, 1902 (32 Stat., 388), it is hereby ordered that any settler under the Belle Fourche project, South Dakota, who is in financial need, including owners or occupants of lands heretofore entered or in private ownership within the third unit, but excluding lands hereafter entered, may receive water for irrigation in the season of 1912 without prior payment of the portion of the installment for operation and maintenance, amounting to 60 cents per acre of irrigable land, subject, however, to the following conditions, viz:

1. Application for such extension of time of payment must be made to the project engineer through the Belle Fourche Valley Water Users Association not later than June 1, 1912. Such application shall be referred to the project engineer with report and recommendation by the Board of Directors of the Association; and such application shall be allowed by the project engineer only in case he is satisfied that the applicant is in financial need.

2. Payment must be made not later than December 1, 1912, and the amount to be paid shall be 65 cents per acre of irrigable land, instead of 60 cents as provided for by public notices.

SAMUEL ADAMS.
First Assistant Secretary of the Interior.

WALTER SORENSON.*Decided May 3, 1912.***HOMESTEAD ENTRY—AMENDMENT—SECTION 2372, R. S.**

The mere fact that an applicant to amend under section 2372, Revised Statutes, as amended by the act of February 24, 1909, made his original entry under the enlarged homestead act, whereas the land to which he desires to amend has not been designated as subject to entry under that act, but is subject to entry under section 2289, Revised Statutes, is no objection to allowance of the amendment, provided the character of the entry be changed to stand under that section and restricted to not more than 160 acres.

THOMPSON, Assistant Secretary:

July 25, 1911, the Commissioner of the General Land Office rejected the application of Walter Sorenson to amend his homestead entry made April 6, 1910, for the S. $\frac{1}{2}$, Sec. 20, T. 16 N., R. 50 E., M. M., so as to embrace in lieu thereof the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and lots 5 and 6, Sec. 6, T. 15 N., R. 55 E., M. M., Miles City, Montana, land district. Appeal from the action of the Commissioner has brought the case before the Department for consideration.

The entry of Sorenson was made subject to the provisions of the enlarged homestead act of February 19, 1909 (35 Stat., 639). The action of the Commissioner was based upon the fact that the land asked for by way of amendment has not been designated as of the character subject to entry under the said enlarged homestead act. He called the party's attention to the act of February 3, 1911 (36 Stat., 896), authorizing the allowance of second homestead entry under certain circumstances, and suggested to the applicant his right to file an application for second entry under said act upon relinquishment of his present entry.

The grounds upon which the applicant claims the right to amend his present entry are that a mistake was made in attempting to describe the lands which he originally intended to enter; that he was misled by his locator who showed him a desirable tract of land which he thought suitable for homestead purposes and gave to the applicant the description as now appearing in the entry; that as a matter of fact the land actually shown to applicant by the locator is railroad land and is not subject to entry; that the land actually embraced in his entry is rough, gravelly, and wholly unfit for any kind of cultivation as to the greater portion of it, and that it would be absolutely impossible to find 80 acres of the entire 320 which could be cultivated as required by the said enlarged act.

Section 2372, R. S., as amended by the act of February 24, 1909 (35 Stat., 645), provides that in all cases where an entry is made of a tract not intended to be entered, amendment of same may be

allowed and the payment transferred from the tract erroneously entered to that intended to be entered if the same has not been disposed of and is subject to entry, or if not subject to entry, then to any other tract liable to such entry. The act provides that the facts be shown by proper affidavit as to the mistake regarding the number of the tract intended to be entered and that every reasonable precaution and exertion was used to avoid the error; that the showing must be such as to entirely satisfy the Commissioner of the General Land Office that the mistake has been made, etc.

The denial of the application by the Commissioner appears to have been predicated upon that portion of the law which authorizes such change of entry "to any other tract liable to *such* entry." The land here applied for, as stated by the Commissioner, is not subject to entry under the enlarged homestead act, and therefore is not subject to such entry as the one which it is sought to have changed. However, the land is, so far as shown, subject to entry under section 2289, R. S., for an area not exceeding 160 acres, and the applicant desires the character of his entry changed so as to stand under section 2289 as well as changed as to the description of the land embraced therein. In a recent case, that of Norman T. Hallanger, decided March 6, 1912, the Department directed change of entry, which was made under the general provisions of the enlarged act so as to stand under section 6 of said act. Where the required amount of money has been paid in connection with a homestead entry, as in this case, to meet the proper charges for the entry if amended, and if there be no substantial administrative objections to allowance of amendment, the character of the entry may be changed so as to stand subject to those other provisions of the homestead laws applicable to the land to be embraced in the amended entry. An entry under the enlarged homestead act is a homestead entry, as is one under section 2289. The general character of the two classes of homestead entry here in question is not so dissimilar as to afford reason for denial of the application to change the enlarged entry to one under the provisions of the general homestead law. Therefore, the reason assigned by the Commissioner for denial of the application is deemed insufficient. However, it does not appear that the claimant has described the land he originally intended to enter. This he should do so that it may be determined whether or not the same is subject to entry. The Commissioner has not questioned the showing as to mistake, but his attention perhaps was not directed to this feature of the case, inasmuch as the action was based upon the point above discussed. The action of the Commissioner is modified as above directed and the case is remanded for further consideration and for supplemental evidence if deemed necessary.

JOHN A. WIEST.

Decided May 3, 1912.

DESERT-LAND ENTRY—ASSIGNMENT—QUALIFICATION.

The assignment of a desert-land entry is not an abandonment thereof; and one who has exhausted his right under the desert-land law by making entry, does not, therefore, by assignment thereof, become qualified, under the act of February 3, 1911, to take another desert-land entry by assignment.

THOMPSON, *Assistant Secretary*:

John A. Wiest appealed from decision of the Commissioner of the General Land Office of July 27, 1911, rejecting assignment to him of Louise M. Ware's desert-land entry for S. $\frac{1}{2}$, Sec. 2, T. 12 S., R. 14 E., S. B. M., Los Angeles, California.

April 29, 1907, Ware made entry, which she assigned April 16, 1911, to John A. Wiest. April 17, 1911, the local office disapproved the assignment because, November 3, 1904, Wiest had made a desert-land entry which he assigned to Edward L. Wiest, and was thereby disqualified to take the assignment. The Commissioner affirmed that action.

The General Land Office records show that December 14, 1903, John A. Wiest made desert-land entry for N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 12, T. 13 S., R. 14 E., S. B. M., Los Angeles, California, which he assigned, November 3, 1904, to Edward L. Wiest. The appeal contends that this was in fact an abandonment, and not an assignment. *Bone v. Rockwood*, 38 L. D., 253, is relied on to sustain such contention.

That case does not hold that qualification to make entry or to take assignment of an entry is restored, to one who has made an entry, by his assignment of it. The question there was who was proper defendant to a contest against an entry assigned to a disqualified person.

An assignment is not an abandonment of an entry. The entry still exists and may be perfected, and title be acquired. If an entry be abandoned, the land falls back into the public domain, and the Government has parted with no land.

John A. Wiest had exhausted his right to make desert-land entry and was disqualified to take an entry by assignment.

The decision is affirmed.

JOHN A. WIEST.

Motion for rehearing of departmental decision of May 3, 1912, *supra*, denied by First Assistant Secretary Adams, July 27, 1912.

INSTRUCTIONS.

RIGHT OF WAY—RESERVOIRS, CANALS, AND DITCHES—EVIDENCE OF WATER RIGHT.

A water-right permit issued by the State of Wyoming to an applicant for right of way for a reservoir, canal, or ditch easement under the act of March 3, 1891, qualified by indorsement thereon that the waters of the stream from which he proposes to secure his water supply is already largely appropriated and that "the issuance of this permit grants only the right to divert and use the surplus or waste waters of the stream, and confers no rights which will interfere with or impair the use of water by prior appropriators." does not constitute a *prima facie* showing of right to appropriate sufficient water to utilize the grant, in contemplation of departmental regulations, and the applicant will be required to furnish other satisfactory *prima facie* evidence showing that he will be able to control, through diversion or storage, sufficient water to utilize the grant desired.

First Assistant Secretary Adams to the Commissioner of the General Land Office, May 3, 1912.

Your letter of February 10, 1912, requests instructions relative to applications for reservoir, canal, and ditch easements under the act of March 3, 1891 (26 Stat., 1095), which look to the storage and diversion of waters in the State of Wyoming, and where it appears to be the practice of the State engineer's office to stamp upon water permits issued an indorsement in the following form:

The records of the State engineer's office show the waters of ——— Creek to be largely appropriated. The appropriator under the permit is hereby notified of this fact, and the issuance of this permit grants only the right to divert and use the surplus or waste waters of the stream, and confers no rights which will interfere with or impair the use of water by prior appropriators.

The regulations governing the allowance of such applications require that *prima facie* evidence of the right to appropriate sufficient water to utilize the grant sought shall be submitted with each application, and you express the opinion that a water permit, qualified with the indorsement above quoted, is not such a *prima facie* showing as the regulations contemplate, but in view of the number of cases presented to your office where the question is involved, request departmental advice upon the subject.

It appears that the matter has been heretofore the subject of correspondence between your office and the State engineer's office and that under date of October 10, 1910, the State engineer of Wyoming advised you that the indorsement in question—

is placed on all permits where the records of flow or the experience of irrigators has shown that there are or may be seasons when the water supply will not be ample in the later summer months. The flood water stamp is a warning that there may be times when it will be impossible to irrigate during the months of July and August. The flood water stamp does not in any way affect the water right that is secured by filing the application for permit and

the certificate of appropriation issued by the State Board of Control makes no mention of flood water. A certificate of appropriation issued under a flood water permit is identical with all other certificates issued. If any person is willing to invest money in the construction of irrigation works, when he is warned by the State in advance that he may not be able to obtain water some years, during the entire growing season, it appears to me that the State and every public officer should do his utmost to assist in such development as may be possible, under these circumstances.

He further stated that the sole purpose of the stamp is to warn the prospective investor and not to limit the right that may be secured. He further expressed the opinion that those persons willing to spend their money to develop lands where the water supply is scanty should be encouraged.

In the opinion of this Department a water permit, qualified on its face by such an indorsement, is without value as evidence of the right of the applicant under the act of March 3, 1891, to appropriate water for diversion and use through the rights of way sought to be secured from the United States. If it is designed to and does operate as a warning to the applicant and to prospective investors that the water supply is or may be insufficient, it should also operate as a warning to the United States not to burden the public domain with grants of easements which may never be utilized for lack of water. The Department's approval in such cases might itself mislead prospective investors and this is another objection to the approval of applications so qualified. The principal objection, however, is the one first noted, viz, that the public lands should not be segregated or burdened through the granting of easements which may not be utilized for the public benefit. In the opinion of this Department the effect of the indorsement described should be to put the land department upon inquiry and lead it to require of the applicant other proof that he will be able to secure water through diversion or storage to be utilized through the easement sought.

You are therefore directed to in such cases require applicants to furnish satisfactory *prima facie* evidence showing that they will be able to control, through diversion or storage, the water necessary to utilize the grant desired.

The papers submitted with your letter relating to the unapproved Elk Hollow Ditch (Cheyenne 07412) and the approved Reynolds Ditch (Douglass 04166) are herewith returned without action.

**CHEYENNE RIVER AND STANDING ROCK INDIAN LANDS—TIME
OF PAYMENTS EXTENDED.****CIRCULAR.**

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., May 4, 1912.**Registers and Receivers, United States Land Offices,**Lemmon and Timber Lake, South Dakota.*

SIRS: Your attention is directed to the act of Congress approved April 13, 1912 (Public, No. 119), which reads as follows:

That any person who has heretofore made a homestead entry for land which was formerly a part of the Cheyenne River Indian Reservation, in the State of South Dakota, or the Standing Rock Indian Reservation in the States of South Dakota and North Dakota, authorized by the act approved May twenty-ninth, nineteen hundred and eight, may apply to the register and receiver of the land office in the district or districts in which the land is located for an extension of time in which to make payment of any amount that is about to become due, and upon the payment of interest for one year in advance, at five per centum per annum upon the amount due, such payment will be extended for a period of one year, and any payment so extended may annually thereafter be extended for a period of one year in the same manner: *Provided*, That the last payment and all other payments must be made within a period not exceeding one year after the last payment becomes due by the terms of the act under which the entry was made; that all moneys paid for interest as herein provided shall be deposited in the Treasury to the credit of the Indians as a part of the proceeds received for the land: *And provided further*, That any entryman who has resided upon and cultivated the land embraced in his entry for the period of time required by law in order to make commutation proof, may make proof, and if the same is approved, further residence and cultivation will not be required: *Provided*, That any and all payments must be made when due unless the entryman applies for an extension and pays interest at five per centum per annum in advance upon the amount due as herein provided, and patent shall be withheld until full and final payment of the purchase price is made in accordance with the provisions hereof.

That failure to make any payment that may be due, unless the same be extended, or to make any extended payment at or before the time to which such payment has been extended as herein provided, will forfeit the entry and the same shall be canceled, and any and all payments theretofore made shall be forfeited.

That nothing herein contained shall affect any valid adverse claim initiated prior to the passage of this act.

No special form of application for extension of time to make payment will be required; the payment by the entryman of interest for one year in advance, on any amount about to become due, at the rate of five per centum per annum, will be sufficient, and the receiver will note, upon receipts and abstracts of collections, the nature and purpose of the payment.

Under the second proviso of the act, any entryman who has resided upon and cultivated the land embraced in his entry for the period of time required by law in order to make commutation proof, may make proof, and if the same is approved, further residence and cultivation will not be required, and the entryman may complete his payments in the annual instalments, and subject to the same conditions as to extensions of time, as though such proof had not been made. If such proof is found satisfactory by you, you will so notify the entryman, and that your approval thereof is subject to review by this office; the register will not issue final certificates, but forward the proof to this office with the returns for the current month, attaching thereto a brief report as to its status. Upon final payment being made, final certificate may issue, in the absence of other objection, without instructions from this office.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

RIGHTS OF WAY—REGULATIONS OF JUNE 6, 1908, AMENDED.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
Washington, May 7, 1912.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: In the matter of the regulations approved June 6, 1908 (36 L. D., 567), concerning rights of way over public lands and reservations for canals, ditches and reservoirs and the use of a right of way for various purposes, I have to direct that modifications be made of paragraphs 38 and 43 thereof. As modified these paragraphs will read as follows:

38. *Nature of grant.*—It is to be specially noted that this act does not make a grant in the nature of an easement but authorizes a mere permit in the nature of a license which permit may be revoked by the Secretary, or his successor, at any time, in his discretion. Further, it gives no right whatever to take from public lands, reservations or parks adjacent to the right of way any materials, earth or stone, for construction or other purposes.

43. *National parks.*—Whenever a right of way is through any of the national parks designated in the act, the applicant must show to the satisfaction of the Department that the location and use of the right of way for the purposes contemplated will not interfere with the uses and purposes for which the park was originally dedicated, and will not result in damage or injury to the natural conditions of property or scenery existing therein. The applicant must

also file the stipulations and bond required by section 6, but, in case of a telephone line, substitute the following: "That upon completion of the telephone lines they shall be subject to the free use of the park officers for all purposes incident to the administration of the park," for stipulation (e) under said section 6.

Whenever right of way within a park is desired for operations in connection with mining, quarrying, cutting timber, or manufacturing lumber, a satisfactory showing must be made of the applicant's right to engage in such operations within the park. If the application and the showing made in support thereof is satisfactory, the Secretary of the Interior will give the required permission in such form as may be deemed proper, according to the features of each case; and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department.

You will see that these changes are made in an appropriate way in circulars hereafter distributed under this act.

Very respectfully,

SAMUEL ADAMS,
First Assistant Secretary.

RECLAMATION—TIETON UNIT, YAKIMA PROJECT, WASHINGTON.

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,
Washington, May 10, 1912.

In pursuance of the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), public notice was issued April 18, 1912 [40 L. D., 579], providing for the opening of certain farm units under the Tieton unit, Yakima project, Washington, and stating the terms and conditions under which the water rights might be obtained for said lands.

Paragraph 15 of the said notice is hereby amended to read as follows:

15. After the expiration of the period for entry hereinbefore provided for, all entries made for any of the lands described, whether for lands not heretofore entered or for lands covered by prior entries which have been canceled by relinquishment or otherwise, shall be accompanied by applications for water rights in due form, and by all charges for building, operation and maintenance then due. Where payments have been duly made by the prior applicants and credits therefor duly assigned in writing the entryman shall continue the payments thus begun. In other cases the entryman shall pay the first instalment in full at the time of his entry; the second instalment shall become due on April 1 of the calendar year following the date of entry; and subsequent instalments shall become due on April

1 of each year thereafter until fully paid. All instalments of charges shall become due and payable as herein provided, whether or not water-right application is made therefor or water is used thereon.

SAMUEL ADAMS,
First Assistant Secretary of the Interior.

MINIDOKA PROJECT—SOUTH SIDE PUMPING UNIT.

ORDER.

DEPARTMENT OF THE INTERIOR,
Washington, May 13, 1912.

Whereas, in pursuance of order of March 24, 1911 [39 L. D., 531], water was furnished in the season of 1911 to lands in the South Side Pumping Unit of the Minidoka project, Idaho, constructed under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388); and

Whereas, it was announced in the said order that the charges for operation and maintenance for 1911 would be as thereafter announced, and payable at the beginning of the irrigation season of 1912; and

Whereas, a number of settlers or land owners are financially unable to pay the rental charge for the season of 1911, announced as \$1.10 per acre by order of March 19, 1912, but are desirous of obtaining water for the season of 1912;

Therefore, it is hereby ordered that any such settler or land owner who in good faith has actually cultivated and improved his land, and has set out an orchard, or has alfalfa growing or seeded, or land cultivated and prepared for seeding, may obtain water for the season of 1912, upon the following conditions:

1. By filing with the project engineer application and affidavit on the form hereinafter set forth, which must be corroborated by two disinterested persons upon information and belief:

APPLICATION FOR EXTENSION OF TIME FOR PAYMENT OF 1911 OPERATION AND MAINTENANCE CHARGES.

I ——— owner, or entryman of ——— Sec. ——— T. ——— S., R. ——— E., containing ——— irrigable acres, do hereby apply for extension of time for payment of the rental charge for 1911, amounting to \$1.10 per acre, to December 1, 1912.

I have made the following progress in the cultivation of the soil: ———

I have placed upon the land the following improvements: ———

If this application is allowed, I hereby agree to pay, on December 1, 1912, the increased rental for 1911 of \$1.20 per acre; and also the rental charge for 1912, at the same time, amounting to \$1.25 per acre.

Applicant.

AFFIDAVIT BY APPLICANT.

STATE OF IDAHO, }
 County of ———, } ss.

———, of the ——— of ———, County of ———, and State of Idaho, being duly sworn, deposes and says that he is unable to make payment of the 1911 water rental charge at the present time, and that the statements contained in his application for extension of time for such payments are true.

Subscribed and sworn to before me, this — day of ———, 1912.

My commission expires ———.

CORROBORATION OF APPLICANT'S STATEMENTS BY TWO DISINTERESTED PERSONS.

1.

STATE OF IDAHO, }
 County of ———, } ss.

———, of the ——— of ———, County of ———, and State of Idaho, being duly sworn deposes and says that he has read the statements contained in the foregoing application and affidavit of ———, and that they are true to the best of his knowledge and belief.

Subscribed and sworn to before me, this — day of ———, 1912.

My commission expires ———.

2.

STATE OF IDAHO, }
 County of ———, } ss.

———, of the ——— of ———, County of ———, and State of Idaho, being duly sworn deposes and says that he has read the statements contained in the foregoing application and affidavit of ———, and that they are true to the best of his knowledge and belief.

Subscribed and sworn to before me, this — day of ———, 1912.

My commission expires ———.

(NOTE.—These affidavits may be made before a judge or clerk of any court, justice of the peace, or notary public.)

2. Such application and affidavits must be filed with the project engineer not later than July 1, 1912.

SAMUEL ADAMS,
First Assistant Secretary of the Interior.

CEDED PORTION OF WIND RIVER RESERVATION—ACT OF APRIL
27, 1912.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, May 15, 1912.

REGISTER AND RECEIVER,

United States Land Office, Lander, Wyoming.

GENTLEMEN: Your attention is directed to the act of Congress approved April 27, 1912 (Public, No. 133), which reads as follows:

That any person who, prior to December 16, 1911, made homestead entry on the ceded portion of the Wind River Reservation in Wyoming, and has not abandoned the same, and who has been unable to secure water for the irrigation of the lands covered by his entry, may secure title to the same upon the submission of satisfactory proof that he has established and maintained actual *bona fide* residence upon his land for a period of not less than eight months and upon payment of all sums remaining due on said land as provided for by the act of March 3, 1905.

Persons entitled to the benefits of said act, must submit final proof, as in other cases, after due posting and publication of notice. Under the terms of the act, no evidence, as to cultivation of the lands, need be offered, but the entryman must show residence upon his claim amounting to at least eight months, and must show that he has been unable to secure water for the irrigation of the land covered by his entry; these two facts having been shown, he is entitled to make payment for the land, as in case of commutation.

You will act upon proofs under this act, issuing final cash certificate upon a proper showing, and the money due having been paid. On the face of each certificate you will make the notation: "Commutated Homestead—Act of April 27, 1912."

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

SAMUEL ADAMS,

First Assistant Secretary.

DRAINAGE OF SWAMP AND OVERFLOWED LANDS IN MINNESOTA.**REGULATIONS.**

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, May 16, 1912.

REGISTERS AND RECEIVERS,

Cass Lake, Crookston and Duluth, Minnesota.

SIRS: Rule 4 of the regulations approved February 29, 1912 (40 L. D., 438), under the act of May 20, 1908 (35 Stat., 169), is hereby amended to read as follows:

4. (A) Under section five of the act a purchaser at any sale of unentered lands will be required to pay to the receiver of the proper district land office the minimum price of one dollar and twenty-five cents per acre, or such other price as may have been fixed by law for such lands, together with the usual fees and commissions charged in entry of like lands under the homestead laws. The price of the land under the act of May 20, 1908, is not affected by the provisions of the free homestead act of May 17, 1900 (31 Stat., 179). Any part of the purchase money arising from the sale of lands by the State which shall be in excess of the payments specified above and of the total drainage charges assessed against such lands shall also be paid to the receiver before patent is issued. In the case of the sale of unpatented lands the purchaser must under section six of the act make similar payments except so much thereof as has already been paid by the entryman; and in such case if the sum received shall be in excess of the payments required under section five of the act specified above and of the drainage assessments and costs of the sale the excess shall be paid to the proper county official for the benefit of and payment to the entryman.

(B) Unless the purchasers of unentered lands shall within ninety days after the sale pay to the proper receiver the fees, commissions and purchase price to which the United States may be entitled as mentioned above, and unless the purchasers of entered lands shall within ninety days after the right of redemption has expired make like payments, any person possessing the qualifications of a homestead entryman may pay to the proper receiver for not more than one hundred and sixty acres of land for which such payment has not been made the unpaid fees, commissions and purchase price to which the United States may be then entitled, the sum at which the land was sold at the sale for drainage charges and in addition thereto if the land was bid in by the State interest on the amount bid the State at the rate of seven per cent per annum from the date of sale and thereupon the person making such payment shall become subrogated to the rights of the purchaser to receive a patent for said land. When any payment is made to effect such subrogation the receiver to whom the money was paid shall transmit to the treasurer of the county where the land is situated the amount for which the land was sold at the sale for drainage charges, together with the interest paid thereon, if any, less any sum in excess of what may be due for such drainage charges if the land when sold was unentered.

(C) In case payment is made as above specified you will issue the usual cash certificates and receipts and forward the papers to this office, together with evidence showing the qualifications of the purchaser on the form (4-007)

provided therefor in the case of a homestead applicant modified as per form herewith. Should no objection appear patent will issue in due course of business.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

STATE OF WYOMING.

Decided May 18, 1912.

COAL LAND—STATE SELECTION—ACT OF JUNE 22, 1910.

The provision in the act of June 22, 1910, that lands withdrawn or classified as coal shall be subject to entry under the homestead laws by actual settlers only, the desert-land law, to selection under the Carey Act, and to withdrawal under the reclamation act, with reservation to the United States of the coal therein, does not include State selections, and an indemnity school-land selection for lands withdrawn or classified as coal could not be allowed under that act prior to extension of that provision by the act of April 30, 1912.

COAL LAND—STATE SELECTION—ACT OF APRIL 30, 1912.

The act of April 30, 1912, extended the operation of the act of June 22, 1910, to include selections by the several States under grants made by Congress; and under that provision an indemnity school-land selection, made prior to and pending at the date of the later act, for lands withdrawn or classified as coal lands, or valuable for coal, may, in the absence of intervening adverse rights or other objection, and upon proper election filed by the State, be allowed and accepted as of that date.

ADAMS, *First Assistant Secretary:*

April 10, 1911, the State of Wyoming filed in the local United States land office at Lander indemnity school-land selection list, No. 05040, for the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 24, T. 44 N., R. 99 W., in lieu of the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 36, T. 48 N., R. 118 W., in the Targhee National Forest, under sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796). The selection was accompanied by the usual nonmineral, nonsaline, and nonoccupancy affidavit, modified, however, to acknowledge the existence of coal deposits within the land. With the selection was submitted the formal election of the State to take patent for the selected land subject to the provisions of the act of June 22, 1910 (36 Stat., 583).

November 14, 1911, the Commissioner of the General Land Office held said selection for cancellation, on the ground that the selected land had been withdrawn as coal lands by departmental order of

November 15, 1908, and classified as coal at the minimum price, or \$10 per acre, by letters "N" of June 10, 1907, and March 4, 1910, and that the selection filed thereafter is not allowable under the provisions of the said act of June 22, 1910.

The State of Wyoming has appealed from said decision, alleging that while the State does not admit that the land is valuable as coal land, it is willing to accept limited patent therefor, and should be allowed so to do, notwithstanding the fact that the act of June 22, 1910, *supra*, does not specifically provide for the allowance of school-land indemnity selections upon public lands withdrawn or classified as coal lands. This contention is untenable, as the right of entry or selection of lands withdrawn or classified as coal lands or valuable for coal is expressly limited by the act in question to homestead entries by actual settlers, to desert-land entries, to selections under the Carey Act, and to withdrawals under the reclamation act of June 17, 1902 (32 Stat., 388), except in the case of entries, selections, or locations made *prior* to June 22, 1910. The Commissioner's decision was therefore correct. However, since the rendition of that decision, Congress, on April 30, 1912, extended the operation of the act of June 22, 1910, to—

selection by the several States within whose limits the lands are situate under grants made by Congress, and to disposition, in the discretion of the Secretary of the Interior, under laws providing for the sale of isolated or disconnected tracts of public lands.

Under this act selections made by the several States under grants to them by Congress may be made upon lands which have been withdrawn or classified as coal lands or are valuable for coal, the patents issued therefor to contain a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same.

The question involved in this case is whether the provisions of the act in question may properly be applied to selections heretofore made upon such lands and now pending. The act of April 30, 1912, states:

That from and after the passage of this act unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands or are valuable for coal shall, in addition to the classes of entries or filings described in the act of Congress approved June twenty-second, nineteen hundred and ten, entitled, "An act to provide for agricultural entries on coal lands," be subject to selection by the several States.

The tender or filing of a school-land indemnity selection by a State in lieu of lands lost by it in place constitutes a mere offer of exchange, confers no vested right upon the selector, and does not prevent the taking or withholding of the land by the United States for public uses or purposes. The transaction is not complete, nor does

the right of the State vest until the acceptance and approval of the offer of exchange by the Secretary of the Interior. School indemnity selections offered by States for lands classified as coal or known to be valuable for such deposits could not, prior to April 30, 1912, be accepted or approved; but those selections offered and pending at the date of passage of the act of April 30, 1912, may, in the absence of intervening adverse rights, and upon proper elections filed by the States, now be allowed and accepted as of April 30, 1912, if there be no other objection, the right to offer exchange being extended by said act, and the Secretary of the Interior being therein authorized to accept the exchange upon conditions hereinbefore stated.

Indemnity selection 05040, Lander, with which there appears to have been filed a proper election in conformity with the requirements of the act of June 22, 1910, *supra*, and the regulations approved thereunder, is accordingly hereby remanded to the General Land Office for further proceedings in accordance with the views above expressed, and the Commissioner's decision of November 14, 1911, modified accordingly.

It is not necessary in the decision of this case to consider the effect, if any, of intervening adverse rights or claims.

CARTHAGE FUEL COMPANY.

Decided May 21, 1912.

COAL LAND—OPENING AND IMPROVING OF MINE.

The projection of underground workings from a tract of privately owned ground into an adjoining tract of public land, with a view to extracting the coal therefrom, such being the only feasible and practical method of opening up and mining the coal from such adjoining tract, followed immediately by the execution and filing of a declaratory statement giving notice of the extent of the coal lands claimed, constitutes the opening and improving of a mine within the meaning of the coal land laws.

COAL-LAND ENTRY BY ASSOCIATION—EXPENDITURE PRECEDENT TO ENTRY.

The expenditure of \$5,000 required by section 2348 of the Revised Statutes to be made by an association of four or more qualified persons seeking to acquire title to 640 acres of coal lands is a condition precedent to the *right to enter*, but not a condition precedent to the right to file declaratory statement.

OPENING AND IMPROVING OF MINE—DECLARATORY STATEMENT—EXPENDITURE.

A qualified association upon opening and improving a mine, accompanied by actual possession, and filing declaratory statement, becomes possessed of the right to assert exclusive claim to 640 acres of coal lands; and by thereafter seasonably expending \$5,000 in working and improving the mine, becomes invested with the right to apply for, pay for, and enter such lands.

COAL LAND—REAPPRAISAL—PRICE.

Where a tract of coal land was reappraised after the opening and improving of a mine and the filing of a declaratory statement, but prior to the expenditure of \$5,000 required by section 2348 of the Revised Statutes, the claimant, upon seasonably making the required expenditure, is entitled to purchase at the price existent at the date of the opening and improving of the mine of coal.

CONFLICTING DECISION OVERRULED.

Johnson v. South Dakota, 17 L. D., 411, in so far as in conflict, overruled.

ADAMS, *First Assistant Secretary*:

The Carthage Fuel Company has filed a motion for rehearing of departmental decision of January 10, 1911, which affirmed the conclusion of the Commissioner of the General Land Office, to the effect that the company must pay the advanced price fixed by reappraisal made subsequently to the filing of its coal declaratory statement for the tracts sought, embracing 638.55 acres, in sections 14, 15, 21, and 22, T. 5 S., R. 2 E., N. M. P. M., Las Cruces, New Mexico, land district.

The motion is supported by additional affidavits and a brief, and counsel representing the company has also been heard in oral argument.

The departmental decision now complained of concludes as follows:

Besides the fact that the area, thus sought as a unit, embraced tracts not previously classified, the undisclosed subsurface operations at the date of the declaratory statement could not, in such a case, be urged against the then impending classification of which the company complains; and upon this state of the record, whereunder no substantive rights under the law are shown to have attached, the Department is unable to see its way clear to disturb the judgment of the Commissioner of the General Land Office, which is accordingly affirmed.

The Commissioner's decision of December 3, 1910, after citing the case of Lehmer v. Carroll, on review (34 L. D., 447), said:

In the case at bar there could be no right to enter the 640 acres until there had been expended in working and improving the mine or mines \$5,000, and, of course, there could be no "preference right to enter." The company not having made the required expenditures of \$5,000 had acquired no right to enter the 640 acres on January 4, 1910, and no such right, preference or other, was created by the filing of the declaratory statement on that date.

From the record it appears that these lands were withdrawn for coal classification July 26, 1906, and, with the exception of four tracts, were classified April 9, 1908, at \$25 per acre, and the excepted tracts were noted "not classified," January 25, 1910, the lands theretofore classified were revalued and the price of said excepted tracts, together with the others, was fixed at from \$50 to \$65 per acre.

The company on January 3 and prior to noon January 4, 1910, entered beneath the surface of the lands now sought and drove an

underground slope 6 x 8 feet and 15 feet in length, at an expense of \$27.25, and removed 18 mine cars of coal. On January 4 the company's coal declaratory statement for the tracts was filed in the local office, wherein the president of the company, as its agent, under oath, averred that the company was in possession of and commenced improvements on said tract on January 3, 1910, and has ever since remained in actual possession and has opened and improved a valuable mine of coal thereon at an expense of \$25, the labor and improvements being a slope of the dimensions above stated, and that the company intended within one year to expend in developing said mine the full amount of \$5,000.

It appears that thereupon the company proceeded with diligence, and upon May 1, 1910, had completed an expenditure in excess of \$5,000 in working and improving its mine. It is reported that on May 4, 1910, the company presented its application to purchase, which was followed by publication and posting.

Thereupon, the local officers, upon a claim made by the company that it was entitled to purchase the land at the price extant at the date of the filing of its declaratory statement, submitted the question of the purchase price to the Commissioner of the General Land Office. In response thereto the Commissioner's decision above mentioned was rendered.

Counsel concedes that as to the tracts in a state of withdrawal on January 4, 1910, the company will be properly required to pay the price fixed by the classification which followed. Consequently, as to such tracts the discussion hereinafter following does not apply.

The precise question presented is as to the price at which the company shall be permitted to purchase the tracts applied for. This involves the consideration and determination of the subsidiary questions whether the company by the projection of its underground workings from its own adjoining ground into these lands (January 3 and 4, 1910) did thereby open and improve a mine under the coal-land laws and thereupon obtain any rights which were protected by the filing of the declaratory statement on the latter date, and also whether thereafter, by the expenditure of over \$5,000, the company became entitled, pursuant to its claimed rights in the premises, to purchase at the price extant January 4, 1910.

The Department after a careful review of the entire record submitted (which does not include the company's application reported to have been filed May 4, 1910) is satisfied that the action taken and the work performed by the declarant company was in good faith. It appears that the only feasible and practical method of opening up and mining the coal from the tracts involved is by means of slopes driven in from the outcrop of the coal bed, so as to reach these tracts

beneath which such beds lie approximately from 200 to 500 feet below the surface, with a general dip southerly and southeasterly.

In his approved report of September 5, 1910, the practical miner who investigated this case in part stated:

It will be seen at a glance that all this work (referring to the major part of the company's work involving the \$5,000 expenditure) was done for the sole purpose of gaining a main haulage way for the coal from the new lands and would not have been done to extract the small amount of coal ahead in the old mine to the line of section 22, especially so, as they had an outlet for that last-mentioned coal at the time, and I vouch for the reasonableness and authenticity of this proposition.

If this company does not purchase these lands they will perhaps never be sold, as in this faulted field it is highly improbable that anyone is going to be foolish enough to try to operate through shafts. In fact it has taken the utmost courage for these people to attempt operations in this field, even from the cropping through slopes. Their costs of mining reach up to the \$2.00 mark and sometimes go up to \$2.35. * * * The company worked up to the Government lines and stopped there rather than steal coal from the Government, which could have been easily accomplished with little chances of detection. They then started to use their rights in a legal manner to obtain more land, showed me their condition, and asked for information.

The above report is corroborative of the showing made on behalf of the company, and is substantiated by detailed plats and tables. In Bulletin 381 (1910) of the Geological Survey, Geologist James H. Gardner, who examined the Carthage coal fields in February, 1908, on page 456, says:

In working the coal mines almost innumerable faults have been encountered. It is even with extreme difficulty that the coal bed, lost at some prominent fault, is discovered in the block beyond. In places entries have been driven ahead in solid sandstone in order to keep the haulage gradient. On account of the numerous faults and changes in dip, there is no definite method in extending the underground workings. Even though the mines are in an arid region, considerable expense is entailed on the operators at depths below 200 feet on account of water rushing in along the fault planes and gathering in the lower workings.

It is the writer's opinion that the Carthage field is an exposed continuation of a larger area of coal bearing rocks lying to the east and beneath the Jornada del Muerto.

From all the facts and circumstances surrounding this case, the Department is satisfied that the company's underground workings prosecuted on January 3 and 4, followed up *immediately* by the execution and filing of its declaratory statement, which served to give notice of the extent of the coal lands claimed by it, was a good and sufficient opening and improving of a mine within the purview of the coal-land laws, under the circumstances.

The next question arising is whether this declaratory statement for over 320 acres was premature, in that it preceded by nearly four months the completion of the \$5,000 expenditure upon which, to-

gether with other prerequisites, the right to enter 640 acres must be predicated.

So far as can be ascertained, this precise question has been directly presented in but one case. The case of *Johnson v. South Dakota* (17 L. D., 411) is cited as an authority to the effect that the \$5,000 expenditure must precede the proper filing of a declaratory statement for 640 acres. There, after referring to section 2348 of the Revised Statutes, it is said:

It is apparent that said section requires, as a condition precedent to the right to file a declaration for coal lands, that some improvement has been made thereon, and that at least \$5,000 had been expended before 640 acres could be entered.

In that case the decision of the Commissioner as a fourth objection held that declarants had no right to declare upon more than 320 acres without showing \$5,000 worth of improvements, and the Department expressed its affirmance of the Commissioner's decision.

In the case of *Lehmer v. Carroll*, on review (34 L. D., 447, 451), the Department said:

The declaratory statement is useful and has a purpose to serve only where time is desired within which to make payment for the lands, as to which a preference right of entry exists, and to complete the entry proceedings. In such a case the declaratory statement gives notice of the right and operates to preserve it for the period specified in section 2350. It has no other function under the statute.

Such being the only purpose of the statute in providing for the filing of a declaratory statement, it must be apparent that where there is no such purpose to serve, no declaratory statement is required.

It can make no difference whether the application to enter be by an individual person for one hundred and sixty acres or by an association of persons for three hundred and twenty acres; or that the application be for six hundred and forty acres by an association of not less than four persons who had expended \$5,000 or over in working and improving a coal mine upon the lands. The principle is the same in all cases. If the privilege of postponing entry in the manner provided by sections 2349 and 2350 after a preference right of entry shall have been acquired under section 2348 be not desired by the claimants, the filing of a declaratory statement before application or entry is not necessary and is not required.

See also *Holladay Coal Co. v. Kirker et al.* (57 Pac., 882).

The coal-land laws, by section 2347, provide that every qualified person and any qualified association shall have the right to enter the specified quantities of vacant coal land. The subsequent sections, so far as pertinent here, are as follows:

Sec. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and im-

proving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Sec. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; * * *

Sec. 2350. * * * all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

Sec. 2351. In case of conflicting claims upon coal-lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. * * *

Paragraph 7 of the coal-land regulations of April 12, 1907, is in part as follows:

A preference right of entry accrues only where a person or association of persons, severally qualified, have opened and improved a coal mine or mines upon the public lands and shall be in actual possession thereof and not by the filing of a declaratory statement. * * *

* * * To preserve a preference right of entry specified in the statute the person or association of persons having acquired the same must present to the register of the proper land district, within sixty days from the date of actual possession and commencement of improvements upon the land, a declaratory statement therefor in all cases where the township plat has been filed. * * *

Section 2349 of the Revised Statutes in terms comprehends "all claims under the preceding section" and they must be presented within sixty days after the date of actual possession and the commencement of improvements. There is no provision to the effect that an association of four or more persons asserting a claim for 640 acres shall present its declaratory statement within sixty days after the completion of the expenditure of not less than \$5,000 in working and improving a mine. Actual possession, concurring with the opening and improving of a mine, is the condition precedent to the declarant's rights, and priority therein, followed by seasonable filing of "the proper notice" and continued good faith, in the case of conflicting claims, determines the preference right to purchase.

The obvious effect of the proviso to section 2348 is to give to the qualified association, on making the \$5,000 expenditure, the right to purchase and enter 640 acres of coal land. In other words, the \$5,000 expenditure is a condition precedent to the *right to enter*, and not to a right to lay claim to the 640-acre area. The subject-matter of the proviso to section 2348 is germane to the text of section 2347 rather than to that section. As was said by the Department in *McWilliams v. Green River Coal Assn.* (23 L. D., 127, 129), "What-

ever legal rights this association may have to enter six hundred and forty acres of land must be found in section 2347 and the proviso to section 2348 of the Revised Statutes. These sections must be construed together." As the scope of the several coal-land sections covers the entire field of assertion of claims to and disposal of coal lands, all the provisions must be read together and so construed as to give harmonious operation if possible.

The right arising from the opening and improving of a coal mine is denominated (section 2348) "a preference right of entry." That right is "*exclusive*;" that is, a right to enter the land claimed, "to the exclusion of all other persons." Charles S. Morrison (36 L. D., 126, 128). In every case, application, notice, proof of such notice, and payment are necessary prerequisites to an actual present right to enter coal lands. In addition, a qualified association seeking 640 acres has the burden of making the \$5,000 expenditure as a further prerequisite to enter such area. In other words, the \$5,000 expenditure is but one of the preliminary conditions to be complied with in order to enter such area, along with application, notice, and payment, necessary in the ordinary case.

That a person or association duly qualified may become invested with a substantial claim or right under the coal-land laws which is short of a right to make present entry, has been expressly recognized in two instances by Congress.

Section 2349, as to coal claimants upon unsurveyed lands, provides that "when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office."

Again, section 2401 *et seq.*, as amended by the act of August 20, 1894 (28 Stat., 423), permits "persons and associations lawfully possessed of coal lands and otherwise qualified to make entry thereof," to apply for the survey of unsurveyed public coal lands under the deposit system.

It thus appears that Congress has acknowledged the existence of a claim or right to and the lawful possession of coal lands, the equivalent, perhaps, of a preference right of entry in essence, but which is not in fact a present existent right to make immediate entry, the exercise or consummation of that right by making entry being postponed to some subsequent time.

In the case at bar the Department, after mature consideration, is of the opinion that upon the opening and improving of its mine, accompanied by actual possession, the company became possessed of the right to assert its exclusive claim to 640 acres of public coal lands, by duly filing its declaratory statement therefor, and that thereafter such association, having seasonably expended \$5,000 in working and improving its mine, becomes invested with the right to apply for,

pay for, and enter such lands. While the right or claim first arising in such an association is not the present and existent right to make entry of 640 acres, nevertheless, under the succeeding sections it is such a "claim" as requires "the filing of a declaratory statement therefor" within the sixty days prescribed, and such association is thereby enabled to "hold" such coal lands for the specified period "under the provisions" of the coal-land laws for the purpose of its protection.

The Department accordingly holds that the Carthage Fuel Company, by the opening and improving of its mine on January 3 and 4, 1910, initiated its claim to the lands in question, which claim was protected by the filing of its "notice." The claim thus arising and asserted was a valid and existent claim at the time of the reappraisal of these lands and for a considerable time prior thereto.

In view of the foregoing considerations and in the absence of other objection, the Carthage Fuel Company will be permitted to purchase and enter the tracts sought by it, which were properly subject to appropriation and were listed at fixed prices on January 4, 1910, at the price existent on said date. But as to the tracts not then restored and not appraised it must pay the price fixed on January 25 following and existent at the time it tendered its application. The case of *Johnson v. South Dakota*, *supra*, in so far as in conflict with the conclusion here reached is overruled.

The departmental decision of January 10, 1911, is accordingly recalled and the Commissioner's decision of December 3, 1910, is reversed. The case is remanded for further action not inconsistent with the views herein expressed.

DESERT-LAND PROOF—EXTENSION OF TIME—ACT APRIL 30, 1912.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, May 21, 1912.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Annexed is a copy of the act of Congress approved April 30, 1912 (Public, No. 143), entitled "An act authorizing the Secretary of the Interior to grant further extension of time within which to make proof on desert land entries.

1. All applications for the benefit of this act must be supported by the affidavits of the applicants and at least two corroborating witnesses, made before an officer legally authorized to administer oaths

in connection with the entry in question, and set forth the facts on account of which the further extension of time is desired.

2. Such applications and affidavits must be filed in the local land office of the district wherein the lands are situated, for transmission, with the recommendation of the register and receiver, to the Commissioner of the General Land Office.

3. You are directed to suspend any application that may be considered defective in form or substance, and allow the applicant an opportunity to remedy the defects, or to file exceptions to the requirements made, advising him that, upon his failure to take any action within a specified time, appropriate recommendations will be made. Should exceptions be filed, they will be duly considered with the entire record. In transmitting applications for the benefit of this act, you will report specifically whether or not there is any contest pending against the entry involved, and, if a contest is pending, you will transmit the application to the Commissioner of the General Land Office by special letter, without action thereon, making due reference to this paragraph.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

(PUBLIC, No. 143.)

An Act Authorizing the Secretary of the Interior to grant further extension of time within which to make proof on desert land entries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior may, in his discretion, in addition to the extension authorized by existing law, grant to any entryman under the desert-land laws a further extension of the time within which he is required to make final proof: *Provided*, That such entryman shall, by his corroborated affidavit filed in the land office of the district where such land is located, show to the satisfaction of the Secretary that because of unavoidable delay in the construction of irrigation works intended to convey water to the land embraced in his entry he is, without fault on his part, unable to make proof of the reclamation and cultivation of said lands as required by law within the time limited therefor, but such extension shall not be granted for a period of more than three years, and this Act shall not affect contests initiated for a valid existing reason: *Provided*, That the total extension of the statutory period for making final proof that may be allowed in any one case under this act, and any other existing statutes of either general or local application, shall be limited to six years in the aggregate.

Approved, April 30, 1912.

COAL LANDS—ISOLATED TRACTS—ACT OF APRIL 30, 1912.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, May 23, 1912.

REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: The act of Congress approved April 30, 1912 (Public, No. 141), provides:

That . . . unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall . . . be subject . . . to disposition . . . under the laws providing for the sale of isolated or disconnected tracts of public lands, but there shall be a reservation to the United States of the coal in such lands so . . . sold, and of the right to prospect for, mine, and remove the same in accordance with the provisions of the act of June 22, 1910, and such lands shall be subject to all the conditions and limitations of said act.

The instructions of January 19, 1912, and April 30, 1912, issued under amended section 2455, Revised Statutes, should be followed in administering this act, in so far as they are applicable, and these instructions are issued in addition thereto:

(1) An application to have coal land offered at public sale must bear across its face the notation provided by paragraph 7 (a) of the circular of September 8, 1910, 39 L. D., 179; in the printed and posted notice of sale will appear the statement:

This land will be sold in accordance with, and subject to, the provisions and reservations of the act of June 22, 1910 (36 Stat., 583).

The purchaser's consent to the reservation of the coal in the land to the United States will not be required, but the cash certificate and patent will contain, respectively, the provisions specified in paragraph 7 (b) of said circular of September 8, 1910.

(2) In cases where offerings have been had, and sales made, of lands coming within the purview of the act of April 30, 1912, the purchasers may furnish their consent to receive patents, containing the limitation provided by said paragraph 7 (b), and, thereupon, the entries may be confirmed and patents, limited as indicated, may issue.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

RECLAMATION—NORTH PLATTE PROJECT—DEFERRED PAYMENTS.**ORDER.**

DEPARTMENT OF THE INTERIOR,
Washington, May 23, 1912.

The time for filing applications for deferment of payment of the portion of the instalment for operation and maintenance for the irrigation season of 1912 on the North Platte project, Nebraska-Wyoming, limited to April 30, 1912, by the order issued March 13, 1912 [40 L. D., 507], is hereby extended to June 15, 1912.

SAMUEL ADAMS,
First Assistant Secretary of the Interior.

SALT LAKE CITY.

Decided May 24, 1912.

RIGHTS OF WAY—RESERVOIR SITE IN NATIONAL FOREST—ACT FEBRUARY 1, 1905.

The mere fact that lands reserved as reservoir sites under the acts of October 2, 1888, and August 30, 1890, fall within the exterior limits of a national forest subsequently created, does not in anywise change their status of reserved reservoir lands, or render them subject to appropriation under section 4 of the act of February 1, 1905, granting rights of way for the construction and maintenance of dams, reservoirs, etc., for municipal and mining purposes, within and across forest reserves of the United States.

ADAMS, *First Assistant Secretary:*

This is the appeal of Salt Lake City from the decision of the Commissioner of the General Land Office, November 29, 1911, rejecting its application under section 4 of the act of February 1, 1905 (33 Stat., 628), for reservoir rights of way in Sec. 34, T. 2 S., R. 3 E., and Secs. 2 and 3, T. 3 S., R. 3 E., Salt Lake City land district, Utah. That section reads as follows:

That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels and canals within and across forest reserves of the United States are hereby granted to citizens and corporations of the United States for municipal or mining purposes and for the purposes of milling and reduction of ores during the period of their beneficial use under such regulations as may be prescribed by the Secretary of the Interior and subject to the laws of the State or Territory in which said reserves are respectively situated.

Under and by the acts of October 2, 1888 (25 Stat., 505, 527), and August 30, 1890 (26 Stat., 371, 391), the lands applied for were selected and designated as reservoir sites, and reserved from sale as

the property of the United States; and have never been opened by proclamation of the President or provision of law for settlement, occupation or other disposition under the public land laws, except as provided in the act of February 26, 1897 (29 Stat., 599). This latter act in no manner affects the application of the city here, and it is not claiming any right thereunder.

These sites fall within the exterior limits of the Wasatch National Forest, created, after their said reservation, by proclamation of the President under section 24 of the act of March 3, 1891 (26 Stat., 1095), and it is this fact which is the basis of the city's application under the act of February 1, 1905, *supra*. The mere fact, however, that these lands thus fall within the exterior limits of the forest in no wise changes their status as reserved reservoir sites under the acts of 1888 and 1890, *supra*, and, as a consequence, the rejection of the pending application by the Commissioner of the General Land Office was proper.

That action is, therefore, affirmed.

ALABAMA COAL LANDS—ACT OF APRIL 23, 1912.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, May 24, 1912.

REGISTER AND RECEIVER,
*United States Land Office,
Montgomery, Alabama.*

SIRS: The following instructions are furnished for your guidance, in connection with the act of April 23, 1912 (Public, No. 129), providing for homestead entry of withdrawn coal lands in Alabama, subject to the conditions of the act of June 22, 1910 (36 Stat., 583):

(1) The lands referred to in the act include all tracts which were, prior to March 3, 1883, reported as containing valuable coal, and which were not under the provisions of the act of March 27, 1906 (34 Stat., 88), classified as agricultural in character.

(2) The circular of September 8, 1910 (39 L. D., 179), under the act of June 22, 1910, will govern proceedings with reference to these lands, so far as applicable, and except as herein modified.

(3) Prior to execution of a homestead application, it must bear across its face the notation provided by paragraph 7 (a) of the circular of September 8, 1910. You are cautioned that this notation may

not be placed by you upon the application after its execution and without applicant's consent. In the absence of the notation, you will treat the application as incomplete, and will allow applicant the usual time to perfect same.

(4) A number of entries heretofore inadvertently allowed for coal lands have been suspended, pending a possible offering of the various tracts involved under the provisions of the act of March 3, 1883 (22 Stat., 487). Under the proviso to section 1 of the act of June 22, 1910, these entries may be perfected, provided the claimants thereunder are willing to take patents containing the reservation, as to the coal, provided by paragraph 7 (b) of said circular.

You will, therefore, issue notice by registered letter to the claimants, advising them of the passage of the act of April 23, 1912, and of their right to now obtain patents, limited as indicated, on condition that they furnish their written consent to receive such patents.

The widow, heirs, devisee, or transferee of a claimant under a final entry may execute the consent above called for, proper evidence being furnished of their rights in the premises. With reference to the entries on which proof has not been submitted, the consent may be executed by the person to whom the homestead right passes by law, if the claimant himself is dead.

The instrument need not be acknowledged before an officer, but the claimant's signature should be witnessed by two persons.

You will, in due time, make report in each case separately, forwarding such papers as may be filed. If the consents are found to have been properly executed, and no adverse claims appear, the cases on which final proof has been submitted will, if otherwise regular, be approved for patenting, and patent, limited as indicated, will issue in due time. A list of the suspended cases is appended.

(5) There is at this time no law which provides for the disposition of the coal in these lands. Persons having homestead entries, pending or perfected, obtain no right to mine coal therefrom, except for their own domestic use, as appears from the first proviso to section 3 of the act of June 22, 1910.

(6) The second proviso to section 3 of the act of June 22, 1910, has no application to the Alabama lands, and claimants are not, therefore, entitled to contest the classification of the land and disprove its coal character.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

(PUBLIC, No. 129.)

An act extending the operation of the act of June twenty-second, nineteen hundred and ten, to coal lands in Alabama.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That unreserved public lands containing coal deposits in the State of Alabama which are now being withheld from homestead entry under the provisions of the act entitled "An act to exclude the public lands in Alabama from the operations of the laws relating to mineral lands," approved March third, eighteen hundred and eighty-three, may be entered under the homestead laws of the United States subject to the provisions, terms, conditions, and limitations prescribed in the act entitled "An act to provide for agricultural entries on coal lands," approved June twenty-second, nineteen hundred and ten.

Approved, April 23, 1912.

LAWS AND REGULATIONS RESPECTING BOUNTY-LAND WARRANTS.

CIRCULAR.

Registers and Receivers of United States Land Offices:

Warrants for bounty land were and are issued by the Commissioner of Pensions for services in wars or battles prior to March 3, 1855, only. Applications for the issuance thereof should be addressed to that official.

Pursuant to authority conferred by section 2414, Revised Statutes (Appendix B), and other legislation, the following regulations are prescribed to govern the assignment, location, and use of such warrants. All regulations inconsistent herewith are revoked.

You must refuse all warrants presented when the assignments thereof do not accord in every essential particular with the rules herein set forth. When the question of title or genuineness is in doubt you must decline to receive the warrant until the holders thereof have submitted the same to the General Land Office for examination and obtained a favorable decision thereon. This office will render an opinion without charge.

Bounty-land warrants should always be described by number, act, and acreage, and in all instances of use or attempted use the register and receiver must forthwith notify this office thereof by special letter, setting forth a description of the warrant and of the entry by serial number, date, land, and name of the entryman, and also whether the warrant was accepted or refused. If you accept the warrant, you will indorse on the upper left-hand corner of the face of same, a similar description of the entry in red ink.

I. ASSIGNMENTS.

1. No assignment of a warrant or power of attorney to sell or locate the same executed prior to the date of the issue thereof can be

recognized by this office. (Rev. Stat., sec. 2436.) Assignments must be in writing. Delivery only constitutes no transfer.

2. The assignment and acknowledgment are required to be indorsed as far as practicable upon the warrant. Should it be found necessary to write the entire assignment on a separate paper, which can only occur when prior assignments or acknowledgments have filled entirely the blank space on the warrant, it must be so attached as to show positively that the warrant assigned was in the hands of the party making the transfer. In such cases the signature of the assignor must be affixed in the presence of the officer before whom it is acknowledged, who must certify that at the date of the assignment the warrant was presented by and in possession of the assignor. (See Form No. 5.) The assignments should describe the warrant by number, act, and acreage. Parties should avoid discrepancies in spelling and write their full Christian names and surnames.

3. The same requirement must be observed in preparing acknowledgments of powers of attorney to sell or locate bounty-land warrants.

4. Blank assignments are void, and will not be recognized by this office. The name of an assignee should be written in the assignment before the warrant is sent to the local or General Land Office. Evidence that such assignee procured the warrant for value under the blank assignment may be required.

5. Each assignment or power of attorney must be attested by two subscribing witnesses. The mark of a witness will not be recognized.

6. A person to whom a warrant is transferred will not be recognized as a legal attesting witness to the assignment, nor as a proper officer to take the acknowledgment thereof.

7. The execution of assignments is required to be acknowledged by the assignor in the presence of a register or receiver of a land office, a judge or clerk of a court of record when authorized to take acknowledgments, a notary public, justice of the peace, a commissioner of deeds, or a United States commissioner, who shall certify to the fact of the acknowledgment and to the identity of the assignor. The official seal of said court, notary public, or commissioner shall be affixed to the certificate. When the acknowledgment is taken before a justice of the peace or other officer without an official seal (except a register or receiver of a land office), it must be accompanied by an additional certificate under seal of proper authority, establishing the official character of such official and the genuineness of his signature. (See Form No. 15.)

Powers of attorney must be acknowledged in like manner.

8. Assignments executed by unmarried females must be accompanied by evidence that they have attained the age of 21 years.

9. Assignments executed by a commissioner, or other designated person acting under a decree of court, must be accompanied by a duly

certified copy of such decree, in which all the proceedings should be recited, and from which it must appear that due, proper, and legal notice of the proceedings had been given to all parties in interest. The jurisdiction of the court must appear. Where assignments can not be procured, the Commissioner of the General Land Office will determine the title to a bounty-land warrant according to the principles and usages of law and equity.

10. Where two assignments exist executed by the same party in favor of different individuals, whether the assignment first in time has been completed or not, to make the second assignment available it must be established by evidence satisfactory to the General Land Office, either that no title passed under the first assignment or that all claims thereunder have been transferred to the second assignee, renounced, or abandoned.

11. When the name of a person has been inserted in an assignment of a warrant and erased, there should be filed evidence satisfactory to this office consisting of an affidavit, duly authenticated, of the assignor or party or parties by whom said name was inserted and the erasure made, fully explaining the facts and circumstances of such insertion and erasure, and stating that no transfer or delivery of said warrant was made to the party whose name had been so inserted, and that the ownership or custody of said warrant had not been changed by such insertion, which affidavit shall be accompanied by satisfactory evidence that a copy of the same has been served personally or by registered letter upon the party whose name was inserted. The affidavit should set forth that the further object thereof is to afford such party an opportunity to file a protest in the General Land Office against the use of the warrant. When the name of a bona fide assignee has been erased from a transfer, an assignment from said assignee to the present holder of the warrant will be required to perfect the title to the warrant. Material erasures in powers of attorney must be satisfactorily explained.

12. When the assignment of a warrant is executed in a foreign country, and the acknowledgment taken by an officer authorized by the laws thereof to perform such duties, the attestation of the American consul in such country should be obtained as to the official character and genuineness of the signature of such official. If the official character, etc., of the foreign officer is attested by a consular agent of such foreign Government residing in this country, the latter's official character must be certified by the diplomatic representatives of such Government in the United States. When such assignments are executed in a foreign language duly authenticated translations thereof must be furnished. Secretaries of legation and consular officers of the United States are authorized to take acknowledgments, but they must certify the same under their official seals.

13. When the persons named as warrantees are described in the warrant as minors, their assignments thereof must be accompanied by satisfactory evidence that they had attained their majority at the date of the transfer.

14. When an assignment has been executed and witnessed, but not acknowledged, it may be proved in open court, but a certified transcript of the proceedings must be attached to the warrant. Such unacknowledged assignment may also be established to the satisfaction of the General Land Office by competent evidence. When such assignment has not been properly attested, it must be made anew.

15. When an assignment is made by an Indian residing among whites the prescribed form will be adopted with this addition, that the officer taking the acknowledgment shall certify that the Indian is capable of contracting the amount paid for the warrant, and that he saw the same paid to the Indian.

16. Where it is made by an Indian holding tribal relations, his identity and ability to contract must be certified by the superintendent of Indian affairs or Indian agent, either of his own knowledge or on the testimony of the chiefs certifying to the amount paid for said warrant; that the same was paid in his presence; and that the transaction was fair and regular. In either case, if the amount paid is not a fair consideration, the assignment will be disregarded.

17. Where a warrant for the service of an Indian is issued or descends to minors who no longer retain their tribal relations, it must be located or sold by a guardian duly appointed and authorized by the proper court for that purpose.

Where the minor or minors retain their tribal relations, the agent or superintendent must certify that they are entitled to the warrant under the laws, usages, and customs of the tribe; and when sold or located, that it was done by the guardian or such proper representative as, according to said laws, usages, and customs, was fully authorized.

Where the signature of a superintendent or an Indian agent is required, the genuineness of the signature of that officer must be certified to by the Commissioner of Indian Affairs.

18. Prior to June 3, 1858, bounty-land warrants were regarded as real estate. Consequently a transfer of a warrant before that date by an administrator must be accompanied by evidence that the same was made in pursuance of an order of court for the sale of the real estate of the decedent.

By the act of June 3, 1858 (11 Stat., 308), bounty-land warrants were declared to be personal chattels, and, as such, assignable by the warrantees, by their widows in certain cases, by their heirs or legatees, or by the legal representatives of the deceased claimant "for the use of the heirs or legatees only."

It follows that the right to assign inures to the assignees of the vendors named above, and to their heirs, legatees, or legal representatives; but these latter are not required to assign "for the use of the heirs or legatees only."

19. Where a warrant has been issued in the name of a deceased soldier, who had applied therefor before his death, the title thereto is declared by section 2444, Revised Statutes (Appendix J), to vest in the widow, if there be one, and if there be no widow, then in the heirs or legatees of the claimant.

20. If the claimant died and left a widow, who also was deceased before the issue of the warrant, then the title thereto vests in the heirs or legatees of the warrantee.

21. To make a warrant issued in the name of a deceased person available it should be accompanied by a certificate under seal from the proper court having probate jurisdiction, showing the fact of the death of the warrantee at a specified date and place, and whether he left a widow, giving her name, if there was one. If there was no widow the said certificate should state whether the warrantee died testate or intestate and give the names of all his heirs at law, specifying adults and minors. Where the assignee of a warrant is deceased a similar certificate should be exhibited setting forth the fact, time, and place of death, his testacy or intestacy, and, in the event he left no will, the names, ages, and places of residence of all the heirs.

22. If it shall appear from such certificate that the warrantee died before the issue of the warrant and left a widow, the assignment of such widow, her heirs, or legal representatives will be a sufficient conveyance of the warrant.

23. If the warrantee died after the issue of the warrant, or if he died before such issue and left no widow, the title vests in his heirs at law or legatees.

24. If he died intestate his heirs, shown to be such by the required certificate of court, may assign the warrant, the adults for themselves and the minors by their guardians, who shall file with the warrant a certified copy of their letters of guardianship or a certificate from the clerk of the proper court stating that such letters had been issued and that they were in force at the date of the assignment.

Or the administrator of the estate of the deceased warrantee who died intestate may assign the warrant "for the use of the heirs or legatees only," upon filing therewith a certified transcript of the letters of administration or a certificate from the clerk of the proper court that the said letters had been issued and that they were in force at the date of the assignment. (See Form No. 6.) Satisfactory evidence may also be required to show that the administrator was appointed at the instance of the heirs or proper parties in interest and transferred the warrant for their benefit.

25. If the warrantee or his assignee died testate a certified transcript of the will must accompany the warrant. If the will specifically disposes of the warrant the legatee or legatees may assign, if adults, in the usual form; if minors, by their guardians as aforesaid. If the will does not specifically dispose of the warrant the executor of the estate of the warrantee may assign "for the use of the heirs or legatees only," but in that case a certified transcript of the letters testamentary or a certificate from the proper authority that such letters had been granted and were in force at the date of the assignment must accompany the transfer. (See Form No. 8.)

26. An assignment executed by an administrator *de bonis non*, with the will annexed, of the estate of the deceased warrantee or transferee must be prepared in accordance with the Form No. 8 prescribed to be used by an executor and accompanied by evidence of his authority to act as required in the case of an administrator of the estate of a warrantee who died intestate.

II. LOCATIONS.

27. Bounty-land warrants may be located by one or more persons who are citizens of the United States or have declared their intention to become such, and have reached majority or by a corporation capable of acquiring and holding the legal title to real property in the jurisdiction where the lands sought lie upon any vacant, surveyed, nonmineral, nonsaline, unreserved, unappropriated public lands of the United States that may be subject to private entry at the time of such location. As no public lands of the United States, except those in the State of Missouri, have been subject to private entry since the passage of the act of March 2, 1889 (25 Stat., 854), such warrants can be located in Missouri only, without any residence upon, cultivation, or improvement of the land. (See Appendix C.)

A corporation locating a land warrant should submit a copy of its charter or articles of incorporation, from which it must appear that it is empowered to acquire and hold realty in said jurisdiction. Said copy should be certified to by some State or county officer who is required by law to have custody of such charter or articles, and who must also certify that the same have not been annulled or in anywise revoked.

A warrant may also be located on behalf of minor heirs or legatees of the soldier upon whose service the same was predicated. Such location must be made in the names of the heirs or legatees and may be made by guardian, who must procure all necessary judicial authority.

28. A warrant can not be located if assigned so as to vest any one person with a greater interest than any other. In other words, each

owner of a warrant at the time of its location must have an equal interest therein. This does not apply to locations by persons in their capacity as heirs.

29. A warrant may be located either at a district land office (see rule 27) or through the agency of this office (Rev. Stat., sec. 2437). If located at a district office, it must be accompanied by a tender of the fees to which the register and receiver are entitled, and by a written application to locate containing a description of the tracts desired and signed by the locator or his attorney in fact. If by the latter, his authority to act must be evidenced by a power of attorney, prepared in accordance with Form No. 14, and indorsed, if practicable, upon the warrant. (See rule No. 2.)

Persons presenting warrants for use or location should furnish affidavits that they are the identical persons to whom the same were issued or assigned, and also a relinquishment thereof to the United States, as follows:

I (or we) do hereby relinquish to the United States the within bounty-land warrant in payment (or in part payment, as the case may be) of the (here describe the tract), located in the name of _____, at the land office at _____, this ____ day of _____, 19__.

[SEAL.]

(Signed) A B.

Witnesses:

C D.

E F.

The following requirements will also govern in locations, but not in homestead, preemption, or other cases mentioned in the act of December 13, 1894 (28 Stat., 594):

(a) The location must be accompanied by the affidavit of the locator or some credible person possessed of the requisite personal knowledge in the premises showing that the land located is not in any manner occupied adversely to the locator, and also a nonsaline affidavit (Form 4-062A).

In jurisdictions where the mineral laws of the United States are applicable you will also require a nonmineral affidavit, Form 4-062. The affidavit of the locator as to the nonmineral and nonsaline character of the land, and that it is not occupied adversely, may be made on Form 4-061a, modified by striking out reference to the act of June 4, 1897.

(b) You will require the locator within 20 days from the filing of his location to begin publication of notice thereof, at his own expense, in a newspaper to be designated by the register as of general circulation in the vicinity of the land and to be the nearest thereto. Such publication must cover a period of 30 days, during which time a similar notice of the location must be posted in the local land office and upon the land included in the location.

(c) The notice must describe the land, give the date of location, and the name and post-office address of the locator, and state that the purpose thereof is to allow all persons claiming the land adversely, or desiring to show it to be ¹ mineral or saline in character, an opportunity to file objection to such location with the local officers for the land district in which the land is situated and to establish their interest therein or the ¹ mineral or saline character thereof. Such notices may be prepared by you or by the locator and submitted to you for approval, and should be in substance as follows:

——— LAND OFFICE,
———, 191—.

Notice is hereby given that ———, whose post-office address is ———, county of ———, State of ———, filed in this office on ———, 191—, his application to locate a military bounty land warrant issued in favor of ——— under the provisions of the act of Congress approved ——— upon the ——— of sec. —, T. —, R. —, ——— meridian. Any and all persons claiming adversely the land described or desiring to object because of the mineral or saline character of the land, or for any other reason, to the disposition to the applicant, should file their affidavits of protest in this office on or before the ——— of ———, 191—.

———,
Register.

The date last specified in the above notice should be not later than 30 days after the beginning of publication and posting.

(d) Proof of publication must consist of an affidavit of the publisher or of the foreman of the newspaper in which the notice was published, with a copy of the published notice attached. Proof that the notice remained posted upon the land during the entire period of publication must be made by the locator or some credible persons having personal knowledge of the fact. The register will certify to the posting in your office by a certificate, Form 4-227, modified so as to show the first and last dates of such posting. The first and last dates of such publication and posting must in all cases be given.

30. If the location is made through this office the warrant must be sent to the commissioner with a request that the same be located in a specified land district, and accompanied by a receipt from the register and receiver for the fees to which they may be severally entitled under section 2238, Revised Statutes.

31. Each warrant is required to be distinctly and separately located upon a compact body of land. If the area of the tract claimed should exceed the number of acres called for in the warrant the locator must pay for the excess in cash. If it should fall short he must take the tract in full satisfaction for his warrant. A person can not enter a body of land with a number of warrants without

¹ Reference to nonmineral character of the land must be omitted where the mineral laws do not govern.

specifying the particular tract or tracts to which each shall be applied and for each warrant there must be a distinct location, certificate and patent.

32. Where the desired tract is subject to entry at a greater minimum than \$1.25 per acre the locator, in addition to the surrendered warrant, must pay in cash the difference between the value of such warrant at \$1.25 per acre and that of the said land; or present a warrant of such denomination as will at the rate of \$1.25 per acre cover the rated price of the tract, and pay the excess in value of the land if any in cash. For example: A tract of 40 acres of land held at \$2.50 per acre may be entered by the location of a warrant calling for 40 acres and the payment of \$50 in cash; or by locating thereon a warrant for 80 acres, the 40 acres embraced in the entry being received in full satisfaction of the same; or a tract containing 80 acres rated at \$2.50 per acre may be entered by the location of two 80-acre warrants, or of one for 160 acres, and so on. It will be required, however, in the entry of a tract held at a greater minimum than \$1.25 per acre by the location of two or more warrants, that each warrant shall be located upon a specific legal subdivision thereof, which legal subdivision shall be received in full satisfaction of the warrant surrendered therefor; and that the excess in value of the lands, if any there be, shall in each case be paid in cash. Hence, a tract containing 40 acres or less of double minimum lands can not be entered by the location of two 40-acre warrants.

33. The distinction hitherto maintained between the use of warrants in homestead and preemption entries and cases under the act of December 13, 1894 (Appendix M), is hereby abolished. In homestead and preemption entries, future use of warrants will no longer be regarded as locations as ruled in *T. M. Pieper* (2 L. D., 673), but they will be treated as cash. In all cases you will issue cash receipts and cash certificates as the bases of patents as now required by rule 42. You will not require the location fees exacted by rule 35 nor will you issue location certificates as the foundation of patents nor will each warrant be required to be applied on separate legal subdivisions as in locations (rule 31). The future practice is outlined in rule 42.

34. When a subdivision is fractional a warrant approximating nearest the number of acres embraced therein may be located thereon, but the fractional excess in area must be paid for with cash and will be conveyed in the same patent with the lands covered by the location of the warrant; a legal subdivision, however, other than those entered by the location of the warrant, will not be regarded as a legitimate fractional excess over such location, but will be required to constitute a separate entry. Thus, a person will not be permitted to make one entry of a quarter section of land by the location of a warrant for 120 acres and a cash payment for the remaining subdivision.

35. Registers and receivers of the local land offices are entitled to the following fees for their services in locating warrants, and the several amounts mentioned must be paid at the time of location.

For a 40-acre warrant, \$0.50 each to the register and receiver; total, \$1.

For a 60-acre warrant, \$0.75 each to the register and receiver; total, \$1.50.

For an 80-acre warrant, \$1 each to the register and receiver; total, \$2.

For a 120-acre warrant, \$1.50 each to the register and receiver; total, \$3.

For a 160-acre warrant, \$2 each to the register and receiver; total, \$4.

36. Upon issuance patents will be transmitted to the proper local office for delivery, unless proper application shall have been previously filed in this office. In no case will patents be delivered, either by this or the local office, except upon receipt of the duplicate certificate of location or an affidavit of its loss or destruction. A transferee of the land requesting the delivery of a patent should furnish, in addition to the foregoing, satisfactory evidence that he owns the land as grantee of the locator.

III. MISCELLANEOUS PROVISIONS.

37. Upon the loss or destruction of a warrant, or where the lawful owner has been fraudulently deprived thereof, the parties may file in this office an affidavit setting forth a description of the warrant by number, act, and acreage, their interest in the premises, a history of the assignment thereof, a description in detail of its disappearance, and the names of all parties in interest. If the same is deemed sufficient to identify the warrant, and satisfactory in other respects, it will be entered as a caveat against the satisfaction of the warrant. Thereafter the General Land Office will take all reasonable precautions to prevent a use of the warrant by persons not entitled to the benefits thereof. The doctrine governing innocent purchasers of negotiable instruments does not apply to warrants.

38. Neither bounty-land warrants nor the lands entered therewith are liable to be sold or made subject to the payment of any debt or claim incurred by any officer or soldier prior to the issuing of the patent (Rev. Stat., sec. 2436). (Appendix F.)

39. Warrants reissued under Revised Statutes, section 2441, are subject to the same rules respecting assignments that apply to original warrants; but in default of an assignment from the warrantee a decree of title must be obtained from a court of competent jurisdiction and a transcript thereof appended to the reissued warrant. Legal notice must be given to all parties in interest. In proper cases the Commissioner of the General Land Office may accept other satisfactory evidence that the original warrant had been assigned to the claimant.

40. When an entry made by the location of a warrant properly assigned to the locator has been canceled the warrant will be returned to its owner. A transfer of the land by the locator of a warrant is held to carry the warrant. This title reverts to the locator if he in-

demnifies the grantee for all loss sustained by such cancellation either by the return of the purchase money or by causing the paramount title to the land to be vested in said grantee. Applications for the return of warrants must be accompanied by the duplicate certificate of location or an affidavit showing the inability of the parties to present the same; evidence that the certificate of location and no assignments thereof were recorded in the proper county; and evidence consisting of a certificate from the proper recording officer, or an abstract of title prepared by a reliable abstracter showing all transfers of the land. When the land has been transferred by the locator or those in privity with him there must also be furnished evidence as to whether or not the grantee sustaining the loss occasioned by the cancellation of the location has been indemnified. See *R. M. Stitt* (33 L. D., 315).

41. When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon, the parties in interest may procure the issue of patent to the locator by filing in the proper local office an acceptable substitute for said warrant. The substitution must be made in the name of the original locator, and may consist of a warrant, cash, or any kind of scrip legally applicable to the class of lands embraced in the entry. Two warrants can not be substituted for one originally located, nor will any payment be received that would destroy the identity of the entry.

Cash can not be substituted in locations made since March 2, 1889, outside of Missouri, except in preemption and homestead cases and cases under the act of December 13, 1894. Attention is directed to *Hussman v. Durham* (165 U. S., 145). Authority to substitute must be first procured from this office in each case.

IV. USE UNDER HOMESTEAD AND PREEMPTION LAWS AND AS CASH UNDER THE ACT OF DECEMBER 13, 1894 (28 STAT., 594).

42. Warrants for bounty lands may be used in commutation of homestead entries under sections 2277 and 2301, Revised Statutes, and in payment of preemption claims under section 2277, Revised Statutes, and are also receivable as cash at \$1.25 per acre under the act of December 13, 1894 (28 Stat., 594), Appendix M, in payment of entries made under the desert-land law of March 3, 1877 (19 Stat., 377), and the amendments thereof; the timber-culture law of March 3, 1873 (17 Stat., 605), and the amendments thereof; the timber and stone law of June 3, 1878 (20 Stat., 89), and the amendments thereof, or for lands sold at public auction.

The preemption laws and the timber-culture act were repealed on March 3, 1891 (26 Stat., 1095). Warrants can still be used in these two classes of entry where the rights of the claimant or entryman attached prior to said repeal, unless otherwise provided by the law under which the land may be opened for entry or other legislation.

In all cases it is immaterial whether the land is in Missouri or not and whether offered or unoffered land is embraced. Warrants can

not thus be used where it is otherwise provided by law; where the lands are being disposed of by the United States for the benefit of Indians and where (unless otherwise provided) the lands have been purchased from an Indian tribe since December 13, 1884.

The land must be subject to entry under the law under which the original entry is made, and all residence upon and cultivation and improvement of the tracts which may be required by such law and the regulations thereunder must be complied with.

In reference to homestead and preemption entries and the four classes of entries specified in the act of December 13, 1894, you are advised that one or more warrants are receivable in payment, or part payment, for a tract of land entered under either of the laws designated, at the rate of \$1.25 per acre upon the expressed value of the warrants or certificates of location. If the amount of money due on such entry exceeds the face value of the warrant at the rate of \$1.25 per acre, the entryman must pay for the excess in cash, but if the face value of the warrant exceeds the amount due on such entry, the claimant must take the tract in full satisfaction of said warrant.

In all cases the warrants are regarded as the equivalent of money to the extent of their value at \$1.25 per acre, and it is unnecessary to apply the warrant to a specific tract. For instance, a 40-acre warrant will be received as \$50 cash in part payment of a timber and stone entry for 160 acres of land. Said warrant need not be applied on any particular 40-acre tract of said 160 acres, and the fees required by rule 35 will not be paid. The local officers will receive from the United States Treasury their commissions upon surrender thereof, as in the case of entries made with cash.

In initiating an entry under desert-land laws, payment may be made in money to the amount of 25 cents per acre, as required by previously existing law or, if preferred, warrants may be tendered as payment, and if the face value of such warrant exceeds the amount of money due in initiating said entry, credit may be given for any balance to be applied to final payment when final proof has been made. In this event you will make such notes on your records as will indicate such credit, giving the number, act, and acreage of the warrant used, and in issuing final papers refer thereon to such credit, collecting any balance due in cash, warrants, or scrip. A notation should also be made on the declaration (Form 4-274) as to such location and credit.

Where such warrants are tendered as payment by other than the party to whom issued, you will require evidence that the entryman is the heir or legatee of the party to whom issued, or see that said warrant has been duly assigned in accordance with rules Nos. 1 to 26.

When a warrant is used in preemption and homestead entries and under the act of December 13, 1894, you will issue receipt 4-131 (new form). (Par. 23, Cir. June 10, 1908.) You will issue certificate

4-189 in entries under the homestead and preemption laws, the timber and stone law, and purchases at public sale; Form 4-200 in desert-land entries and Form 4-217 in timber-culture entries. You will embody in said certificate and receipt a description of the warrant by number, act, acreage, date of issue, and name of the warrantee.

In locations you will issue Forms 4-002 and 4-191.

In all cases the parties must furnish an affidavit of identity and a relinquishment of the warrant to the United States.

On his "Schedule of serial numbers" (Form 4-115), the register will designate the locations and also the entries in connection with which warrants are used in payment. On his "Abstract of certificates of deposits on account of surveys, military bounty land warrants, scrip, and certificates of location" (Form 4-106a), the receiver will make report of bounty-land warrants located or surrendered as cash as indicated on said abstract. The total of the "Abstract of certificates of deposits on account of surveys, military bounty land warrants, scrip, and certificates of location" will be reported by the receiver on the debit side of his "Account current" in the space provided therefor. The receiver will report, upon the proper abstract of collections according to the class of entry in connection with which surrendered, the amount of bounty-land warrants surrendered, together with any amount paid in connection therewith in cash, in the same manner as if the entire payment had been made in cash.

All warrants received must be forwarded to this office with the regular monthly returns.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved May 24, 1912.

SAMUEL ADAMS,
First Assistant Secretary.

FORMS.

FORM No. 1.

For the assignment of a warrant by the warrantee.

For value received I, A B, to whom the within warrant, No. —, for ——— acres, act of ——— ———, 18—, was issued, do hereby sell and assign unto C D, of ——— County, ———, and to his heirs and assigns forever, the said warrant.

Witness my hand and seal this — day of ———, 19—.

A B. [SEAL.]

Attest:

E F.

G H.

(See rules Nos. 2 and 5.)

FORM NO. 2.

Of acknowledgment where the vendor is known to the officer taking the same.

STATE OF ———, }
 ——— County, } ss:

On this — day of ———, 19—, before me personally came A B, to me well known, and acknowledged the foregoing assignment to be his act and deed, and I certify that the said A B is the identical person to whom the within warrant issued and who executed the foregoing assignment thereof.

(See rule No. 7.)

[Officer's Signature.]

FORM NO. 3.

Of acknowledgment where the vendor is not known to the officer and his identity has to be proved.

STATE OF ———, }
 ——— County, } ss:

On this — day of ———, 19—, before me personally came A B and E F, of the county of ———, in the State of ———, and the said E F, being well known to me as a credible and disinterested person, was duly sworn by me, and on his oath declared and said that he well knows the said A B and that he is the same person to whom the within warrant issued and who executed the foregoing assignment; and his testimony being satisfactory evidence to me of that fact, the said A B thereupon acknowledged the said assignment to be his act and deed.

[Officer's Signature.]

FORM NO. 4.

For the assignment of a warrant by the assignee.

For value received I, C D, to whom the within warrant, No. ———, for ——— acres, act of ——— ———, 18—, was assigned, do hereby sell and assign unto E F, of ——— County, ———, and to his heirs and assigns forever, the said warrant.

Witness my hand and seal this — day of ———, 19—.

C D. [SEAL.]

Attest:

G H.

I J.

(See rules Nos. 2 and 5.)

FORM NO. 5.

For the certificate of acknowledgment of an assignment when the same is written on a separate paper and attached to the warrant.

STATE OF ———, }
 ——— County, } ss:

On the — day of ———, 19—, before me personally came ———, to me well known, and acknowledged the foregoing assignment to be ——— act and deed, and in my presence this day subscribed ——— name thereto: and I certify that the said ——— is the identical person to whom the annexed warrant No. — was assigned, and that the said warrant at the time of making the foregoing assignment was presented by and in the possession of him, the said ———.

———. [SEAL.]

(See rules Nos. 2 and 7.)

FORM No. 6.

For the assignment of a warrant by an administrator.

For value received I, A B, administrator of the estate of C D, deceased, who died intestate, to whom the within warrant No. ——— for ——— acres, act of ———, 18—, was issued, do hereby sell and assign, “for the use of the heirs only,” unto E F, of ——— County, ———, and to his heirs and assigns forever, the said warrant.

Witness my hand and seal this — day of —, 19—.

A B. [SEAL.]
Administrator.

Attest:

G H.

I J.

(See rule No. 24.)

NOTE.—A certified copy of the letters of administration must accompany this assignment, or a certificate filed from the clerk of the proper court that said letters had been duly issued and *were in force at the date of the assignment*.

If the *date* of the death of the warrantee is not stated in the letters of administration, or other evidence as above mentioned, the same *must* appear in the *clerk's certificate* appended thereto.

FORM No. 7.

For the acknowledgment.

STATE OF ———, }
——— County, } ss:

On this — day of —, 19—, before me personally came —, to me well known, and acknowledged the foregoing assignment to be — act and deed, and in my presence subscribed — name thereto; and I certify that the said — is administrator of the estate of the warrantee —, deceased, to whom the within warrant No. — was issued, and who executed the foregoing assignment thereof.

Witness my hand and official seal the day and year above written.

[Officer's Signature.]

NOTE.—In assignments made by an administrator of the estate of a deceased assignee the words “for the use of the heirs only” may be omitted, but in all other respects the foregoing form of assignment and acknowledgment will be required.

FORM No. 8.

For the assignment of a warrant by an executor.

For value received, I, A B, executor of the estate of C D, deceased, who died testate, to whom the within warrant No. — for — acres, act of —, 18—, was issued, do hereby sell and assign (“for the use of the heirs only,” or “for the use of the legatees as mentioned in the will,” as the case may be) unto E F, of — County, State of —, and to his heirs and assigns forever, the said warrant.

Witness my hand and seal this — day of —, 19—.

A B, Executor. [SEAL.]

Attest:

G H.

I J.

(See rule No. 25.)

NOTE.—A certified copy of the *will*, and also of the *letters testamentary* or other proper evidence under the seal of said court, showing that said executor was duly appointed and authorized to act as such *at the date of said assignment*, must accompany the same.

If the date of the death of the warrantee is not stated in the *letters testamentary* or other evidence, as above mentioned, it must appear in the *certificate of the clerk* appended thereto, as taken from the records of said court. The certificate of the acknowledgment may be the same as in Form No. 7, except that the word "*executor*" must be used instead of "*administrator*."

FORM No. 9.

For the assignment and acknowledgment of a warrant by the heirs at law of a deceased warrantee.

For value received, we, A B, C D, and E F, the only heirs at law of G H, deceased, to whom the within warrant No. — for — acres, act of —, 18—, was issued, do sell and assign unto I J, of — County, State of —, and to his heirs and assigns forever, the said warrant.

Witness our hands and seals this — day of —, 19—.

Attest:

K L.

M N.

(See rule No. 24.)

_____. [SEAL.]

_____. [SEAL.]

_____. [SEAL.]

FORM No. 10.

For the acknowledgment.

STATE OF —, }
— County, } ss:

On this — day of —, 19—, before me personally came A B, C D, and E F, to me well known, and acknowledged the foregoing assignment to be their act and deed, and I certify that the said A B, C D, and E F are the identical persons named in the attached certificate¹ as the only heirs at law of said warrantee, deceased, and who executed the foregoing assignment thereof.

Witness my hand and official seal the day and year above written.

[Officer's signature.]

FORM No. 11.

For the assignment of a warrant by a guardian.

For value received, I, A B, guardian of the person and estate of C D, a minor warrantee to whom the within warrant No. — for — acres, act of —, 18—, was issued (or "*a minor heir at law, as mentioned in the attached certificate*"—see the note following *Form No. 10*), do hereby sell and assign, for the benefit of said minor, unto E F, of the county of —, State of —, and to his heirs and assigns forever, the said warrant.

Witness my hand and seal this — day of —, 19—.

_____, Guardian. [SEAL.]

Attest:

G H.

I J.

(See rule No. 24.)

¹ For the evidence of the *death* and *heirship* above mentioned it will be necessary to procure and attach a certificate under seal from a *court* having probate jurisdiction, showing that it has been proved to the satisfaction of said *court*, in *open court*, that said warrantee E H is dead, the *date* of his *death*, whether he died testate or intestate: whether or not he left a *widow*, and who are his heirs and *only* heirs at law, with their respective ages.

FORM No. 12.

For the acknowledgment.

STATE OF ———, }
 ——— County, } ss:

On this ——— day of ———, 19—, before me personally came ———, to me well known, and acknowledged the foregoing assignment to be his act and deed, and in my presence subscribed his name thereto; and I certify that the said ——— is guardian of the person and estate of said minor, and who executed the foregoing assignment thereof.

Witness my hand and official seal the day and year above written.

[Officer's signature.]

NOTE.—A certified copy of the letters of guardianship, or other legal evidence, under the seal of the proper probate court, showing that the said guardian was duly appointed and authorized to act as such at the date of said assignment, must accompany the same.

FORM No. 13.

Of a power of attorney to sell a warrant.

Know all men by these presents, that I (*here insert the name of the warrantee or owner of the warrant*), of the county of ———, in the State of ———, do hereby constitute and appoint ———, of the county of ———, in the State of ———, my true and lawful attorney, for me and in my name to sell and convey the within land warrant No. ——— for ——— acres, issued under the act of ———, 18—.

Witness my hand and seal this ——— day of ———, 19—.

[Warrantee's or owner's signature.] [SEAL.]

Signed in the presence of—

A B.

C D.

(See rules Nos. 2, 3, and 5.)

NOTE.—The form of acknowledgment of a power of attorney must be the same as for the sale of the warrant, and both must be indorsed upon the warrant if there is sufficient blank space thereon that can be used for that purpose; otherwise it must be certified to as in the certificate of acknowledgment stated in Form No. 5.

FORM No. 14.

For a power of attorney to locate a warrant.

Know all men by these presents, that I (*here insert the name of the warrantee or assignee*), of the county of ———, in the State of ———, do hereby constitute and appoint A B, of the county of ———, in the State of ———, my true and lawful attorney, for me and in my name to locate land warrant No. ——— for ——— acres of land, which issued under the act of ———, 18—.

Witness my hand and seal this ——— day of ———, 19—.

[Warrantee's or assignee's name.] [SEAL.]

Signed in presence of—

C D.

E F.

(See rules Nos. 2, 3, 5, and 29.)

FORM No. 15.

Of the certificate of the clerk of the court, judge, or other person who is authorized to certify under seal to the official character of the officer who takes acknowledgments of assignments.

STATE OF ———, }
 County, } ss:

I, A B, clerk of the court ———, in the county and State aforesaid, hereby certify that John Jones, whose genuine signature is affixed to the above acknowledgment, was, at the time of assigning the same, a justice of the peace (*notary public or other officer*) duly authorized by law to take such acknowledgment, and that full faith and credit are due to all his official acts as such.

Given under my hand and the seal of said court this — day of —, 19—.

A B, Clerk. [SEAL.]

(See rule No. 7.)

NOTE.—Where any acknowledgment is taken before a clerk of a court, judge, notary public, or other officer duly authorized by law, with their respective *official seals* affixed, the above certificate will not be required; nor is such certificate required when the acknowledgment is taken before a register or receiver of a United States land office.

APPENDICES.

APPENDIX A.

Revised Statutes, Section 2277.

All warrants for military bounty lands, which are issued under any law of the United States, shall be received in payment of preemption rights at the rate of one dollar and twenty-five cents per acre, for the quantity of land therein specified; but where the land is rated at one dollar and twenty-five cents per acre, and does not exceed the area specified in the warrant, it must be taken in full satisfaction thereof.

Revised Statutes, Section 2301.

Nothing in this chapter shall be so construed as to prevent any person who has availed himself of the benefits of section twenty-two hundred and eighty-nine (pertaining to homesteads), from paying the minimum price for the quantity of land so entered, at any time before the expiration of five years and obtaining a patent therefor from the Government, as in other cases directed by law, on making proof of settlement and cultivation as provided by law, granting preemption rights.

APPENDIX B.

Revised Statutes, Section 2414.

All warrants for military bounty lands which have been or may hereafter be issued under any law of the United States, and all valid locations of the same which have been or may hereafter be made, are declared to be assignable by deed or instrument of writing made and executed according to such form and pursuant to such regulations as may be prescribed by the Commissioner of the General Land Office, so as to vest the assignee with all the rights of the original owner of the warrant or location.

APPENDIX C.

Revised Statutes, Section 2415.

The warrants which have been or may hereafter be issued in pursuance of law may be located according to the legal subdivisions of the public lands in one body upon any lands of the United States subject to private entry at the time of such location at the minimum price. When such warrant is located on lands which are subject to entry at a greater minimum than one dollar and twenty-five cents per acre, the locator shall pay to the United States in cash the difference between the value of such warrants at one dollar and twenty-five cents per acre and the tract of land located on. But where such tract is rated at one dollar and twenty-five cents per acre, and does not exceed the area specified in the warrant, it must be taken in full satisfaction thereof.

An act to withdraw certain public lands from private entry, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act no public lands of the United States, except those in the State of Missouri shall be subject to private entry.

Approved, March 2, 1889 (25 Stat., 854).

NOTE.—From March 2, 1889, until June 5, 1901, Revised Statutes, section 2414, and the act of March 2, 1889, were so construed that warrants could not be legally located outside of Missouri. (McDonogh School Fund, 11 L. D., 378; J. T. Brown, 21 L. D., 47.) This construction was changed on June 5, 1901, and it was held that the act of March 2, 1889, did not affect the laws granting bounty and that warrants could be located throughout the public domain on unappropriated land that would have been subject to private entry if said act had never been passed. (V. H. Provensal, 30 L. D., 616; J. L. Bradford, 31 L. D., 132; C. P. Maginnis, 31 L. D., 222.) These cases were overruled January 31, 1907, in L. W. Simpson (35 L. D., 399), and on review on June 20, 1907 (35 L. D., 609), and Roy McDonald (36 L. D., 205), when it was again held that warrants could be located in Missouri only, which is the construction now prevailing. The rights of persons who located warrants between June 5, 1901, and June 20, 1907, outside of Missouri on the faith of prior interpretations were considered. Relief was accorded to said persons by an act of May 29, 1908 (35 Stat., 468), appendix N; provided the locations were otherwise legal.

APPENDIX D.

Revised Statutes, Section 2416.

In all cases of warrants for bounty lands, issued by virtue of an act approved July twenty-seven, one thousand eight hundred and forty-two, and of two acts approved January twenty-seven, one thousand eight hundred and thirty-five, therein and thereby revised, and of two acts to the same intent, respectively, approved June twenty-six, eighteen hundred and forty-eight, and February eight, eighteen hundred and fifty-four, for military services in the revolutionary war, or in the war of eighteen hundred and twelve with Great Britain, which remained unsatisfied on the second day of July, eighteen hundred and sixty-four, it is lawful for the person in whose name such warrant issued, his heirs or legal representatives, to enter in quarter sections, at the proper local land office in any of the States or Territories, the quantity of the public lands subject to private entry which he is entitled to under such warrant.

Revised Statutes, Section 2417.

All warrants for bounty lands referred to in the preceding section may be located at any time, in conformity with the general laws in force at the time of such location.

APPENDIX E.

Revised Statutes, Section 2423.

Every person for whom provision is made by sections twenty-four hundred and eighteen and twenty-four hundred and twenty shall receive a warrant from the Department of the Interior for the quantity of land to which he is entitled; and, upon the return of such warrant with evidence of the location thereof having been legally made, to the General Land Office, a patent shall be issued therefor.

APPENDIX F.

Revised Statutes, Section 2436.

All sales, mortgages, letters of attorney, or other instruments of writing, going to affect the title or claim to any warrant issued, or to be issued, or any land granted, or to be granted, under the preceding provisions of this chapter, made or executed prior to the issue of such warrant, shall be null and void to all intents and purposes whatsoever; nor shall such warrant, or the land obtained thereby, be in anywise affected by, or charged with, or subject to, the payment of any debt or claim incurred by any officer or soldier, prior to the issuing of the patent.

APPENDIX G.

Revised Statutes, Section 2437.

It shall be the duty of the Commissioner of the General Land Office, under such regulations as may be prescribed by the Secretary of the Interior, to cause to be located, free of expense, any warrant which the holder may transmit to the General Land Office for that purpose, in such State or land district as the holder or warrantee may designate, and upon good farming land, so far as the same can be ascertained from the maps, plats, and field notes of the surveyor, or from any other information in the possession of the local office, and, upon the location being made, the Secretary shall cause a patent to be transmitted to such warrantee or holder.

APPENDIX H.

Revised Statutes, Section 2441.

Whenever it appears that any certificate or warrant, issued in pursuance of any law granting bounty land, has been lost or destroyed, whether the same has been sold and assigned by the warrantee or not, the Secretary of the Interior is required to cause a new certificate or warrant of like tenor to be issued in lieu thereof; which new certificate or warrant may be assigned, located, and patented in like manner as other certificates or warrants for bounty land are now authorized by law to be assigned, located, and patented; and in all cases where warrants have been, or may be, reissued, the original warrant, in whose hands it may be, shall be deemed and held to be null and void, and the assignment thereof, if any there be, fraudulent; and no patent shall ever issue for any land located therewith, unless such presumption of fraud in the assignment be removed by the proof that the same was executed by the warrantee in good faith and for a valuable consideration.

Revised Statutes, Section 2442.

The Secretary of the Interior is required to prescribe such regulations for carrying the preceding section into effect as he may deem necessary and proper, in order to protect the Government against imposition and fraud by persons claiming the benefit thereof; and all laws and parts of laws for the punishment of frauds against the United States are made applicable to frauds under that section.

APPENDIX I.

Revised Statutes, Section 2443.

In all cases where an officer or soldier of the revolutionary war, or a soldier of the war of eighteen hundred and twelve, was entitled to bounty land, has died before obtaining a patent for the land, and where application is made by a part only of the heirs of such deceased officer or soldier for such bounty land, it shall be the duty of the Secretary of the Interior to issue the patent in the name of the heirs of such deceased officer or soldier, without specifying each; and the patent so issued in the name of the heirs, generally, shall inure to the benefit of the whole, in such portions as they are severally entitled to by the laws of descent in the State or Territory where the officer or soldier belonged at the time of his death.

APPENDIX J.

Revised Statutes, Section 2444.

When proof has been or hereafter is filed in the Pension Office, during the lifetime of a claimant, establishing, to the satisfaction of that office, his right to a warrant for military services, and such warrant has not been, or may not be, issued until after the death of the claimant, and all such warrants as have been heretofore issued subsequent to the death of the claimant, the title to such warrants shall vest in his widow, if there be one; and if there be no widow, then in the heirs or legatees of the claimant; and all military bounty-land warrants issued pursuant to law shall be treated as personal chattels, and may be conveyed by assignment of such widow, heirs, or legatees, or by the legal representatives of the deceased claimant, for the use of such heirs or legatees only.

APPENDIX K.

Revised Statutes, Section 2446.

Where an actual settler on the public lands has sought, or hereafter attempts, to locate the land settled on and improved by him, with a military bounty-land warrant, and where, from any cause, an error has occurred in making such location, he is authorized to relinquish the land so erroneously located, and to locate such warrant upon the land so settled upon and improved by him, if the same then be vacant, and if not, upon any other vacant land, on making proof of those facts to the satisfaction of the land officers, according to such rules and regulations as may be prescribed by the Commissioner of the General Land Office and subject to his final adjudication.

APPENDIX L.

Revised Statutes, Section 5420.

Every person who falsely makes, alters, forges, or counterfeits any military bounty-land warrant or military bounty-land warrant certificate issued or purporting to have been issued by the Commissioner of Pensions under any act of

Congress, or any certificate of location of any military bounty-land warrant, or any duplicate thereof, or military bounty-land warrant certificate upon any of the lands of the United States, or any certificate of the purchase of any of the lands of the United States, or any duplicate certificate of the purchase of any of the lands of the United States, or any receipt for the purchase money of any of the lands of the United States, or any duplicate receipt for the purchase money of any lands of the United States, issued or purporting to have been issued by the register and receiver at any land office of the United States, or by either of them, or who passes, utters, or publishes as true any false, forged, or counterfeited military bounty-land warrant, military bounty-land warrant certificate, certificate of location, or duplicate certificate of location, certificate of purchase, duplicate certificate of purchase, receipt or duplicate receipt for the purchase money of any of the lands of the United States, knowing the same to be false or forged, shall be imprisoned at hard labor not less than three years nor more than 10 years.

Revised Statutes, Section 5421.

Every person who falsely makes, alters, forges, or counterfeits, or causes or procures to be falsely made, altered, forged, or counterfeited, or willingly aids or assists in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, or other writing for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money, or who utters or publishes as true, or causes to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, or who transmits to, or presents at, or causes or procures to be transmitted to, or presented at, any office or officer of the Government of the United States any deed, power of attorney, order, certificate, receipt, or other writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be imprisoned at hard labor for a period of not less than one year nor more than ten years, or shall be imprisoned not more than five years and fined not more than one thousand dollars.

APPENDIX M.

An act to provide for the location and satisfaction of outstanding military bounty-land warrants and certificates of location under section three of the act approved June second, eighteen hundred and fifty-eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in addition to the benefits now given thereto by law, all unsatisfied military bounty-land warrants under any act of Congress, and unsatisfied indemnity certificates of location under the act of Congress approved June second, eighteen hundred and fifty-eight, whether heretofore or hereafter issued, shall be receivable at the rate of one dollar and twenty-five cents per acre in payment or part payment for any lands entered under the desert-land law of March third, eighteen hundred and eighty-seven, entitled "An act to provide for the sale of desert lands in certain States and Territories," and the amendments thereto, the timber-culture law of March third, eighteen hundred and seventy-three, entitled "An act to encourage the growth of timber on the western prairies," and the amendments thereto; the timber and stone law of June third, eighteen hundred and seventy-eight, entitled "An act for the sale of timber lands in the States of California, Oregon,

Nebraska, and Washington Territory," and the amendments thereto, or for lands which may be sold at public auction, except such lands as shall have been purchased from any Indian tribe within ten years last past.

Approved, December 13, 1894 (28 Stat., 594).

NOTE.—The act of March 3, 1891 (26 Stat., 1095), repealed the timber-culture law of June 14, 1878 (20 Stat., 113), and all other laws supplementary thereto, and also all laws allowing preemption claims. Said repeal was not extended to valid rights previously accruing or bona fide claims initiated prior thereto or preemption claims to Indian lands covered by section 10 of the act of March 3, 1891 (26 Stat., 1095).

APPENDIX N.

An act authorizing a resurvey of certain townships in the State of Wyoming, and for other purposes.

* * * * *

SEC. 12. That all patents heretofore issued on applications made for title to public lands between June fifth, nineteen hundred and one, and June twentieth, nineteen hundred and seven, with either military bounty land warrants, agricultural college land scrip, or surveyor general's certificates, be, and the same are hereby, declared valid; and that all such locations, where the applications to locate were made between June fifth, nineteen hundred and one, and June twentieth, nineteen hundred and seven, with either military bounty land warrants, agricultural college land scrip, or surveyor general's certificates, and upon which patents have not been issued, but which may hereafter be approved for patent by the department under the ruling in the case of Roy McDonald, December twenty-first, nineteen hundred and seven, are hereby declared legal, and the Commissioner of the General Land Office is hereby authorized and directed to issue patents on all such locations which may be approved by him for patent as above provided: *Provided*, That they are otherwise in accordance with the rules and regulations in such cases made and provided.

* * * * *

Approved, May 29, 1908 (35 Stat., 468).

APPENDIX O.

Instructions and circulars since June 3, 1847, affecting warrants for bounty land.

June 3, 1847 (1 Lester's Land Laws, 576).
 October 1, 1847 (1 Lester's Land Laws, 578).
 April 1, 1848 (1 Lester's Land Laws, 579).
 August 28, 1848 (1 Lester's Land Laws, 580).
 March 31, 1851 (1 Lester's Land Laws, 581).
 March 31, 1851 (1 Lester's Land Laws, 583).
 April 4, 1851 (1 Lester's Land Laws, 584).
 March 23, 1852 (1 Lester's Land Laws, 585).
 April 2, 1852 (1 Lester's Land Laws, 589).
 October 14, 1852 (1 Lester's Land Laws, 591).
 April 20, 1853 (1 Lester's Land Laws, 590).
 October 17, 1853 (1 Lester's Land Laws, 592).
 May 3, 1855 (1 Lester's Land Laws, 598).
 May 23, 1856 (1 Lester's Land Laws, 607).
 February 19, 1858 (1 Lester's Land Laws, 617).
 November 1, 1858 (1 Lester's Land Laws, 607).

August 27, 1861 (1 Zabriskie's Land Laws, 363).
 March 10, 1869 (2 Lester's Land Laws, 240).
 March 30, 1870 (see Copp's Public Land Laws, 727).
 August 2, 1871 (see Copp's Public Land Laws, 727).
 April 30, 1872 (see Copp's Public Land Laws, 727).
 June 17, 1875 (see Copp's Public Land Laws, 179).
 July 20, 1875 (see Copp's Public Land Laws, 727).
 February 28, 1881 (Copp for April, 1881, p. 10).
 October 15, 1884 (3 Land Decisions, 145).
 September 24, 1886 (5 Land Decisions, 178).
 February 2, 1895 (20 Land Decisions, 95).
 February 18, 1896 (27 Land Decisions, 218).
 July 6, 1898 (27 Land Decisions, 234).
 January 3, 1899 (28 Land Decisions, 1).
 March 28, 1902 (31 Land Decisions, 277).
 July 31, 1902 (31 Land Decisions, 399).
 May 8, 1905 (33 Land Decisions, 544).
 January 31, 1907 (35 Land Decisions, 399).
 June 20, 1907 (35 Land Decisions, 609).
 December 21, 1907 (36 Land Decisions, 205).
 February 21, 1908 (36 Land Decisions, 278).
 March 26, 1908 (36 Land Decisions, 347).
 June 9, 1908 (36 Land Decisions, 501).
 June 16, 1908 (36 Land Decisions, 522).
 April 30, 1909 (37 Land Decisions, 617).
 May 24, 1912 (41 Land Decisions, —).

APPENDIX P.

Federal legislation affecting warrants for bounty land.¹

*Revolutionary bounty-land warrants.*²

Resolutions and ordinances of the Continental Congress or Congress of the Confederation:

August 14, 1776 (2 Journals of Congress, 310).
 August 27, 1776 (2 Journals of Congress, 330).
 September 16, 1776 (2 Journals of Congress, 357).
 September 18, 1776 (2 Journals of Congress, 361).
 September 20, 1776 (2 Journals of Congress, 365).
 January 26, 1779 (5 Journals of Congress, 36).
 August 12, 1780 (6 Journals of Congress, 164).
 September 30, 1780 (6 Journals of Congress, 205).
 May 20, 1785 (10 Journals of Congress, 173).
 April 21, 1787 (12 Journals of Congress, 55).
 October 22, 1787 (12 Journals of Congress, 212).
 July 9, 1788 (4 Old Journal, 832).

Acts of Congress:

May 18, 1796 (1 Stat., 467).
 June 1, 1796 (1 Stat., 490).

¹ For the convenience of the bar and the public, these laws are herewith presented. No inferences as to construction should be drawn from the arrangement thereof.

² Legislation by New York affecting this series of warrants may be found in acts of July 25, 1782 (1 Laws of New York, 521); Feb. 28, 1789 (3 Laws of New York, 89); and Apr. 4, 1800 (4 Laws of New York, 558).

Acts of Congress—Continued.

- March 2, 1799 (1 Stat., 724).
- February 11, 1800 (2 Stat., 7).
- March 1, 1800 (2 Stat., 14).
- April 26, 1800 (2 Stat., 155).
- March 3, 1803 (2 Stat., 236).
- March 19, 1804 (2 Stat., 271).
- March 27, 1804 (2 Stat., 306).
- March 2, 1805, section 8 (2 Stat., 329).
- April 15, 1806 (2 Stat., 378).
- March 21, 1808 (2 Stat., 477).
- December 19, 1809 (2 Stat., 555).
- July 5, 1813 (3 Stat., 3).
- April 16, 1816 (3 Stat., 284).
- April 27, 1816 (3 Stat., 317).
- March 9, 1818 (3 Stat., 408).
- February 24, 1819 (3 Stat., 487).
- March 2, 1821 (3 Stat., 617).
- March 3, 1823 (R. S., sec. 5421; 2 Stat., 771).
- March 3, 1823 (3 Stat., 776).
- May 26, 1824 (4 Stat., 60).
- March 3, 1825 (4 Stat., 133).
- March 2, 1827 (4 Stat., 219).
- February 25, 1829 (4 Stat., 333).
- May 30, 1830¹ (4 Stat., 422).
- March 31, 1832¹ (4 Stat., 500).
- July 13, 1832¹ (4 Stat., 578).
- March 2, 1833¹ (4 Stat., 665).
- January 27, 1835 (4 Stat., 749).
- March 3, 1835¹ (4 Stat., 770).
- July 27, 1842 (5 Stat., 497).
- March 3, 1843 (5 Stat., 650).
- June 26, 1848 (9 Stat., 240).
- August 14, 1848 (9 Stat., 332).
- March 3, 1853 (10 Stat., 256).
- February 8, 1854 (10 Stat., 267).
- March 3, 1855 (10 Stat., 701).
- July 2, 1864 (R. S., sec. 2416; 13 Stat., 378).

See Revised Statutes, secs. 2414 to 2446, and also miscellaneous and general provisions herein.²

War of 1812.

Acts of Congress:

- December 24, 1811 (2 Stat., 669).
- January 11, 1812 (2 Stat., 672).
- May 6, 1812 (2 Stat., 728).
- January 20, 1813³ (2 Stat., 792).
- December 10, 1814 (3 Stat., 147).

¹ Scrip acts.

² Bounty land for service in the War of the Revolution was also granted by Virginia, Massachusetts, New York, Maryland, North Carolina, Maine, Pennsylvania, South Carolina, and Georgia.

³ Bounty to Canadian volunteers: Colonel, 960 acres; major, 800 acres; captain, 640 acres; subaltern officers, 480 acres; privates and others, 320 acres.

Acts of Congress—Continued.

- March 5, 1816¹ (3 Stat., 256).
- April 16, 1816¹ (3 Stat., 287).
- April 29, 1816 (3 Stat., 332).
- March 9, 1818 (3 Stat., 409).
- March 27, 1818 (3 Stat., 411).
- April 18, 1818 (3 Stat., 428).
- February 24, 1819 (3 Stat., 487).
- May 15, 1820 (3 Stat., 602).
- March 2, 1821 (3 Stat., 617).
- March 3, 1823 (R. S., sec. 5421; 3 Stat., 771).
- January 1, 1824 (4 Stat., 1).
- May 26, 1824 (4 Stat., 60).
- May 22, 1826 (4 Stat., 190).
- February 25, 1829 (4 Stat., 333).
- March 23, 1830 (4 Stat., 383).
- January 27, 1835 (4 Stat., 749).
- June 23, 1836 (5 Stat., 58).
- May 27, 1840 (5 Stat., 380).
- July 27, 1842 (5 Stat., 497).
- March 3, 1843 (R. S., sec. 2443) (5 Stat., 650).
- June 26, 1848 (9 Stat., 240).
- July 25, 1848 (9 Stat., 251).
- August 14, 1848 (9 Stat., 332).
- March 22, 1852 (10 Stat., 3).
- July 12, 1852 (10 Stat., 14).
- January 7, 1853 (10 Stat., 150).
- March 3, 1853 (R. S., secs. 2369-71) (10 Stat., 256).
- February 8, 1854 (10 Stat., 267).
- June 23, 1860 (12 Stat., 90).
- July 2, 1864 (R. S., sec. 2416) (13 Stat., 379).

See Revised Statutes, sections 2414 to 2446, and also miscellaneous and general provisions herein.

War of 1812 and Indian wars.²

Acts of Congress:

- September 28, 1850 (9 Stat., 520).
- March 22, 1852 (10 Stat., 3).
- August 4, 1854 (10 Stat., 576).
- August 5, 1854 (10 Stat., 581).
- March 3, 1855² (10 Stat., 701).
- May 14, 1856 (R. S., sec. 2426) (11 Stat., 8).
- June 3, 1858 (11 Stat., 308).
- June 23, 1860 (12 Stat., 90).
- March 3, 1869 (15 Stat., 336).
- March 9, 1878 (20 Stat., 28).

See Revised Statutes, sections 2414 to 2446, and also miscellaneous and general provisions herein.

War with Mexico.

Acts of Congress:

- February 11, 1847 (9 Stat., 123).
- May 17, 1848 (9 Stat., 231).

¹ Allowed warrants for 320 acres.

² Extended bounty for services in the War of the Revolution.

Acts of Congress—Continued.

May 27, 1848 (9 Stat., 232).
 June 16, 1848 (9 Stat., 335).
 July 10, 1848 (9 Stat., 246).
 August 10, 1848 (9 Stat., 340).
 August 14, 1848 (9 Stat., 332).
 March 3, 1849 (9 Stat., 366).
 September 28, 1850 (9 Stat., 520).
 March 22, 1852 (10 Stat., 3).
 August 4, 1854 (10 Stat., 576).
 August 5, 1854 (10 Stat., 581).
 March 3, 1855 (10 Stat., 701).
 May 14, 1856 (11 Stat., 8).
 June 3, 1858 (11 Stat., 308).
 June 23, 1860 (12 Stat., 90).
 March 3, 1869 (15 Stat., 336).
 January 29, 1887 (24 Stat., 371).

See Revised Statutes, sections 2414 to 2446, and also miscellaneous and general provisions herein.

Miscellaneous and general provisions.

Acts of Congress:

April 25, 1812,¹ section 7 (R. S., sec. 457) (2 Stat., 716).
 April 27, 1816 (R. S., sec. 2440) (3 Stat., 317).
 March 3, 1819 (R. S., sec. 2369) (3 Stat., 526).
 March 3, 1823 (R. S., sec. 5421) (3 Stat., 771).
 May 24, 1828 (4 Stat., 301).
 March 3, 1843 (R. S., sec. 2443) (5 Stat., 650).
 March 3, 1847² (5 Stat., 790).
 August 14, 1848 (9 Stat., 332).
 March 3, 1849 (R. S., sec. 441) (9 Stat., 395).
 September 28, 1850 (R. S., sec. 2418) (9 Stat., 520).
 March 22, 1852 (R. S., sec. 2414) (10 Stat., 3).
 March 3, 1853 (R. S., sec. 2446) (10 Stat., 256).
 March 2, 1855 (R. S., sec. 2483) (10 Stat., 634).
 March 3, 1855 (R. S., sec. 2425) (10 Stat., 701).
 February 20, 1856 (R. S., sec. 473) (11 Stat., 1).
 May 14, 1856 (R. S., sec. 2426) (11 Stat., 8).
 March 3, 1857 (11 Stat., 250).
 June 3, 1858 (R. S., sec. 2444) (11 Stat., 308).
 June 3, 1858 (11 Stat., 309).
 February 5, 1859 (R. S., sec. 5420) (11 Stat., 381).
 June 7, 1860 (12 Stat., 28).
 June 23, 1860 (R. S., sec. 2441) (12 Stat., 90).
 March 2, 1863 (R. S., sec. 5438) (12 Stat., 696).
 July 13, 1866 (14 Stat., 363).
 March 2, 1867 (R. S., sec. 3480) (14 Stat., 571).
 March 3, 1869 (R. S., sec. 2445) (15 Stat., 336).
 July 8, 1870 (R. S., sec. 4786) (16 Stat., 194).
 May 21, 1872 (17 Stat., 137).
 June 8, 1872 (17 Stat., 340).

¹ Creates General Land Office.

² Creates Department of the Interior.

Acts of Congress—Continued.

March 3, 1873 (R. S., secs. 4714 and 4748) (17 Stat., 573).

March 3, 1873 (R. S., sec. 5485; 17 Stat., 575).

July 4, 1876¹ (19 Stat., 73).

March 2, 1877 (19 Stat., 512).

March 9, 1878 (20 Stat., 28).

March 3, 1879 (20 Stat., 627).

July 25, 1882 (R. S., sec. 4749; 22 Stat., 175).

July 4, 1884 (23 Stat., 101).

January 29, 1887 (24 Stat., 371).

May 14, 1888¹ (25 Stat., 622).

March 2, 1889¹ (25 Stat., 854).

July 1, 1890 (26 Stat., 209).

September 1, 1890 (26 Stat., 679).

December 13, 1894 (28 Stat., 594).

March 11, 1898 (R. S., sec. 3480; 30 Stat., 274).

July 7, 1898 (R. S., sec. 4746; 30 Stat., 718).

May 29, 1908 (35 Stat., 468).

May 30, 1908 (R. S., sec. 5438; 35 Stat., 555).

See also Revised Statutes, sections 441, 457, 473, 2238 (subdivision 5), 2277, 2301, 2369-2371, 2414-2446, 2483, 3480, 4714, 4744, 4748, 4785-4786, 5420-5421, 5438, 5485.

Bounty-land warrants now issued may be under the acts of February 11, 1847; September 28, 1850; or March 3, 1855; and may be for 10, 40, 60, 80, 100, 120, or 160 acres.

*Virginia Revolutionary bounty-land warrants.*²

Resolutions of Virginia:

October, 1776 (9 Henning's Statutes, 179).

October, 1778 (9 Henning's Statutes, 588).

May, 1779 (10 Henning's Statutes, 23).

May, 1779 (10 Henning's Statutes, 32 and 50).

October, 1779 (10 Henning's Statutes, 141).

October, 1779 (10 Henning's Statutes, 159).

May, 1780 (10 Henning's Statutes, 296).

October, 1780 (10 Henning's Statutes, 326).

January 2, 1781 (10 Henning's Statutes, 564).

November, 1781 (10 Henning's Statutes, 462).

November, 1781 (10 Henning's Statutes, 484).

November, 1781 (10 Henning's Statutes, 499).

May, 1782 (11 Henning's Statutes, 81).

October, 1782 (11 Henning's Statutes, 105).

October, 1782 (11 Henning's Statutes, 135).

October, 1782 (11 Henning's Statutes, 161).

October, 1783 (11 Henning's Statutes, 309).

Digest of laws on land bounties (11 Henning's Statutes, 565).

Federal legislation.

Resolution of March 1, 1784 (9 Journals of Congress, 67).

Ordinance of May 20, 1785 (10 Journals of Congress, 167).

¹ Pertains to withdrawals from private cash entry.

² The United States satisfied some of these warrants until March 3, 1900.

Ordinance of July 17, 1788 (4 Old Journal, 836).

Acts of Congress :

August 10, 1790 (1 Stat., 182).
June 9, 1794 (1 Stat., 394).
May 13, 1800 (2 Stat., 80).
April 26, 1802 (2 Stat., 155).
March 3, 1803 (2 Stat., 236).
March 19, 1804 (2 Stat., 271).
March 23, 1804 (2 Stat., 274).
March 2, 1805 (2 Stat., 329).
March 2, 1807 (2 Stat., 424).
March 3, 1807 (2 Stat., 437).
March 16, 1810 (2 Stat., 589).
June 26, 1812 (2 Stat., 764).
November 3, 1814 (3 Stat., 143).
February 22, 1815 (3 Stat., 212).
April 11, 1818 (3 Stat., 423).
February 9, 1821 (3 Stat., 612).
March 1, 1823 (3 Stat., 772).
May 26, 1824 (4 Stat., 70).
May 20, 1826 (4 Stat., 189).
February 24, 1829 (4 Stat., 335).
April 23, 1830 (4 Stat., 395).
May 26, 1830 (4 Stat., 405).
May 30, 1830¹ (4 Stat., 422).
February 12, 1831 (4 Stat., 440).
March 31, 1832¹ (4 Stat., 500).
July 13, 1832¹ (4 Stat., 578).
March 2, 1833¹ (4 Stat., 665).
March 3, 1835¹ (4 Stat., 770).
July 7, 1838 (5 Stat., 262).
March 3, 1839 (5 Stat., 329).
August 19, 1841 (5 Stat., 449).
March 3, 1843 (5 Stat., 627).
July 29, 1846 (9 Stat., 41).
July 5, 1848 (9 Stat., 244).
August 14, 1848 (9 Stat., 332).
February 20, 1850 (9 Stat., 421).
August 31, 1852¹ (10 Stat., 143).
December 19, 1854 (10 Stat., 598).
March 3, 1855 (10 Stat., 701).
June 22, 1860¹ (12 Stat., 84).
February 18, 1871 (16 Stat., 416).
May 27, 1880 (21 Stat., 142).
August 7, 1882 (22 Stat., 348).
May 12, 1894 (28 Stat., 76).
March 3, 1899¹ (30 Stat., 1099).

¹ Relate to exchange for scrip or satisfaction thereof.

PALAGIA K. GALLAS.

Decided May 27, 1912.

REPAYMENT—VOLUNTARY RELINQUISHMENT OF ENTRY.

Where a properly-allowed homestead entry is canceled upon voluntary relinquishment, neither the act of June 16, 1880, nor the act of March 26, 1908, authorizes repayment of the moneys paid in connection therewith.

CONFLICTING DEPARTMENTAL DECISION.

Departmental decision in Flossie Freeman, 40 L. D., 106, so far as it announces a contrary rule, will no longer be followed.

THOMPSON, *Assistant Secretary*:

Palagia K. Gallas has appealed from the decision of the Commissioner of the General Land Office rendered November 4, 1911, denying repayment of moneys paid in connection with homestead entry, No. 05875 (formerly Great Falls 017968), made by her June 16, 1910, for the W. $\frac{1}{2}$, Sec. 34, T. 31 N., R. 7 E., Havre, Montana, land district, containing 320 acres, under the enlarged homestead act of February 19, 1909 (35 Stat., 639).

Said entry was canceled upon relinquishment filed December 19, 1911, and entrywoman has since made second homestead entry (Lewistown 014650) under the act of February 3, 1911 (36 Stat., 896).

On June 19, 1911, entrywoman filed application for repayment of the fee and commission paid by her in connection with her original entry, alleging that before making entry she examined the land she desired to enter, having been shown the same by a locator, but through some mistake or fraud on the part of the locator her entry papers described other land, that was hilly and valueless. She alleges further that she filed relinquishment on that date.

It appears, however, that no relinquishment was with the record, and the same had not been noted upon the records of the General Land Office on November 4, 1911, when the Commissioner's decision now complained of was rendered. Subsequently, as above noted, the relinquishment was filed, under date of December 19, 1911. The Commissioner's decision dismissed the application for repayment for the reason that the General Land Office records showed the entry in question to be intact. It was, however, further stated in the said decision that in the event she should execute relinquishment for the purpose of repayment the claim would necessarily be denied. As above noted, entrywoman has since executed the said application [relinquishment] for repayment, and the matter thus somewhat irregularly comes before the Department upon appeal from the Commissioner's decision, since it seems that repayment has not been actually denied by the General Land Office.

The appeal is based upon the theory that repayment has been denied by the Commissioner, and will be considered by the Department on that basis, as there would appear to be no sufficient reason for remand-

ing the case for technical action by the Commissioner on this point, since final result can be reached upon the record at this time by the Department.

Repayment can only be allowed upon specific statutory authority. The instances in which repayment is authorized by the act of June 16, 1880 (21 Stat., 287), are where entries have been canceled for conflict or have been erroneously allowed and can not be confirmed, neither of which conditions is found in this case. The act of March 26, 1908 (35 Stat., 48), provides that purchase moneys and commissions paid under any public-land law shall be repaid in all cases where the entry, application, or proof "has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application."

In the present case, while the element of fraud or attempted fraud may be entirely absent, yet the application or entry was not rejected by the Government, but, on the contrary, the application was accepted, and the entry allowed thereon was canceled because of the voluntary relinquishment of the entry. Hence, the case is not one coming under either the act of June 16, 1880, or the act of March 26, 1908. See cases of Marie Steinberg (37 L. D., 234) and Joseph Gibson (37 L. D., 338).

Appellant states that she was wrongfully located on the tract described, that her entry was made in good faith, but upon further examination of the land it was found that the tracts entered are not those she originally examined; that the entry is high and rough and not susceptible of cultivation. This error, however, is not chargeable to the Government, and if the entrywoman, as alleged, was deceived by her locator, it is purely a personal matter between them, to which the Government is not a party.

From the facts as disclosed by the record, it would appear that under the act of February 24, 1909 (35 Stat., 645), entrywoman would have been entitled to amendment of her entry. No steps looking to this end, however, were undertaken by appellant, and since the second entry has already been made under the act of February 3, 1911, above noted, in another land district, it is too late to use this method to save her fees and commissions paid in connection with the first entry.

Appellant relies at length upon the case of Flossie Freeman (40 L. D., 106) and cites the syllabus thereof, which is as follows:

The mere fact that the entry was voluntarily relinquished will not absolutely bar repayment under the act of June 16, 1880, in the absence of fraud or bad faith in the making of the entry, if the relinquishment was made for good and sufficient causes and under such conditions and circumstances as would entitle the person relinquishing to make second entry as though the first had not been made.

A careful examination of the case, however, will disclose that the language used in the decision and quoted in the syllabus had reference to the act of March 26, 1908, and not the act of June 16, 1880, as erroneously stated therein. It will further appear that in the case relied upon repayment was denied because the applicant failed to show why she did not seek to have her entry amended so as to embrace the tract she intended to enter and have her payments transferred to that land. It would therefore appear that even under this case appellant Gallas here would not be entitled to repayment, as she has made no showing why she did not, upon discovering the mistake, file application for amendment.

In any event, however, upon reconsideration of the principles there involved, the Department is of the opinion that the statements made in the Flossie Freeman case are too broad and the doctrine enunciated in the syllabus thereof will no longer be followed.

It therefore follows that the Department is without authority to grant repayment in the present case. The decision appealed from is accordingly affirmed.

ELBRIDGE V. GREEN.

Decided May 29, 1912.

REPAYMENT—RELINQUISHMENT OF DESERT-LAND ENTRY—AMENDMENT.

Where a desert-land entry was made for land other than that intended to be taken, due to mistake on the part of the applicant or his agent in giving erroneous description of the land desired, and the entry was thereafter for that reason voluntarily relinquished, neither the act of June 16, 1880, nor the act of March 26, 1908, authorizes repayment of the moneys paid in connection with the entry; but in the absence of fraud the entry canceled upon the relinquishment may be reinstated, if the entryman so desires, with a view to permitting him to amend his entry, under the provisions of the act of February 24, 1909, to cover other unappropriated public land.

THOMPSON, *Assistant Secretary*:

Elbridge V. Green has appealed from the decision of the Commissioner of the General Land Office rendered August 29, 1911, denying his application for repayment of money paid in connection with his desert-land entry, No. 06645, made on November 30, 1908, for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 2, T. 11 S., R. 3 E., Rapid City, South Dakota, land district.

On July 15, 1909, he applied for amendment of his entry to secure in lieu of the land covered thereby the SE. $\frac{1}{4}$, Sec. 1, T. 11 S., R. 3 E., same district, stating in his affidavit, duly corroborated, that he intended originally to enter the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 2, T. 12 S., R. 3 E., said land district, but that said land had since been

homesteaded. The affidavit contained the usual formal requisites and explained his failure to enter the correct tract in the first place by saying that the township number was given by his agent to the United States commissioner before whom entry was made as No. 11 instead of No. 12.

By Commissioner's decision of September 27, 1910, the desired amendment was refused because the land sought had been appropriated as to three-quarters thereof by Martha Kenyon (D. L. E. 06651) on November 28, 1908. The said decision contained a finding, however, that Green was entitled, under the act of February 24, 1909 (35 Stat., 645), to amendment of his entry.

It appears that Green made no further attempt to amend but on May 24, 1911, he filed the application for repayment now being considered.

Repayment can only be allowed upon specific statutory authority. The instances in which repayment is authorized by the act of June 16, 1880 (21 Stat., 287), are where entries are canceled for conflict or have been erroneously allowed and can not be confirmed. It is clear that a mistake was made in this case, but it was one for which the applicant or his agent is solely responsible. There is an allegation in his affidavit that the land which he relinquished upon filing the petition for repayment is of the character or so located that it is not possible to irrigate the same. This showing, however, is not conclusive.

It was the purpose of the act of March 26, 1908 (35 Stat., 48), to afford repayment where moneys are covered into the Treasury "under any application to make any filing, location, selection, entry, or proof," and in the process of adjudication such application, entry, or proof is rejected and the party or his legal representatives have not been guilty of fraud or attempted fraud in the transaction. In the present case, while the element of fraud or attempted fraud may be entirely absent, yet the application or entry of Green was not rejected by the Government, but, on the contrary, his application was accepted and the entry allowed thereon was only canceled because of the voluntary relinquishment or surrender of claim thereunder. Hence the case is not one coming either under the act of June 16, 1880, or the act of March 26, 1908. See cases of Marie Steinberg (37 L. D., 234) and Joseph Gibson (37 L. D., 338).

In view of the circumstances, however, and the finding that there was no fraud, there would appear to be no reason why entryman should not be permitted to amend his entry to cover other land not otherwise appropriated. If proper application therefor is filed within a reasonable time, the entry will be reinstated for that purpose.

The decision appealed from is accordingly affirmed.

FRED V. HOOK.

Decided May 29, 1912.

RECLAMATION—WITHDRAWAL—ENTRY—ACT OF FEBRUARY 18, 1911.

The act of February 18, 1911, providing that where entries covering lands withdrawn under the reclamation act, made prior to June 25, 1910, have been or may be relinquished in whole or in part, the lands so relinquished shall be subject to settlement and entry under the homestead law, as amended by the reclamation act, has no application where cancellation of the entry was the result of a contest, and not of a relinquishment.

THOMPSON, *Assistant Secretary*:

May 15, 1911, Fred V. Hook made homestead entry for lots 3 and 4 and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 1, T. 4 N., R. 6 W., Boise, Idaho, land district, subject to the provisions of the act of June 22, 1910 (36 Stat., 583).

The above described tracts were withdrawn from entry, except homestead, on December 22, 1903, under the second form of withdrawal, under the provisions of section 3 of the act of June 17, 1902 (32 Stat., 388), in connection with the Payette-Boise irrigation project.

By section 5 of the act of June 25, 1910 (36 Stat., 835), the entry of lands reserved for irrigation purposes, under the second form of withdrawal, was prohibited "until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and made public announcement of the same."

That section was, however, amended by the act of February 18, 1911 (36 Stat., 917), by adding the following proviso thereto, "that where entries made prior to June 25, 1910, have been or may be relinquished in whole or in part, the lands so relinquished shall be subject to settlement and entry under the homestead law," as amended by the reclamation act of June 17, 1902.

It appears that on March 27 and November 4, 1909, the Secretary of the Interior approved preliminary farm unit plats for said township, upon which these tracts were designated as farm unit "B," but that no public notice has been issued announcing the water-right charges thereon and the date when water could be applied.

It also appears that said tracts were formerly embraced in a homestead entry made March 9, 1907, which was canceled July 24, 1909, as a result of a contest against the same, but the claim is made that under said act of 1911, Hook's entry should be allowed to stand.

September 11, 1911, the Commissioner of the General Land Office, in his decision said, that the purpose of the act of February 18, 1911, was to allow homestead entrymen, who made entry prior to June 25,

1910, "to relinquish their entries and sell their improvements to prospective entrymen, but no provision was made for the allowance of entries upon such lands uncovered in any other manner than through relinquishment." The allowance of Hook's entry was declared to have been an error and the same was held for cancellation, from which appeal to the Department was taken.

In view of the situation thus disclosed and the fact that considerable time had elapsed since the Commissioner's decision was rendered, the Department, under date of April 25, 1912, called upon the Director of the Reclamation Service for a report, as to whether the water-right charges and the date when the water might be applied were ready for announcement, with a view, if such should be the case, of allowing the entry to remain intact, subject to the provisions of the reclamation act.

In response thereto, the Director of said Service, under date of May 10, 1912, reported that the lands within Hook's entry would be irrigated through the utilization of a water supply created by the construction of the Arrowrock dam, which was authorized by the Department, January 6, 1911, and which is at the present time about 17½% completed; that the plans of the Reclamation Service did not contemplate the opening to irrigation of any lands within the Boise project, by public notice, pending the completion of all construction work; that under existing conditions the time when such announcement can be made "is an indeterminate question, depending upon various future contingencies, but that in any event there is no likelihood of this being done at any time within the next two or three years or more."

It is clear that Hook's entry was erroneously allowed, as under no proper construction of the language of the act of 1911, can it be held to apply to lands upon which such former homestead entries were canceled as a result of a contest.

The entire matter considered, there appears to be no good ground for disturbing the decision appealed from, and the same is accordingly affirmed.

ROBERT H. WILLIAMS.

Decided May 29, 1912.

ENTRY WITHIN RECLAMATION WITHDRAWAL—ACT OF FEBRUARY 18, 1911.

The act of February 18, 1911, providing that upon relinquishment of an entry, made prior to June 25, 1910, for lands within a reclamation withdrawal, the lands so relinquished shall be subject to settlement and entry under the reclamation act, has reference only to lands covered by second-form withdrawals, and has no application to lands withdrawn under the first form.

CONFORMATION TO FARM UNIT—ENTRY OF LAND UNCOVERED.

Where a homestead entry covering lands within a reclamation withdrawal is conformed to a farm unit, the lands thereby uncovered are not relinquished within the meaning of the act of February 18, 1911, and are not subject to entry thereunder.

THOMPSON, *Assistant Secretary*:

Robert H. Williams has appealed from the decision of the Commissioner of the General Land Office, dated October 16, 1911, which affirms the action of the register and receiver rejecting his application to make homestead entry (09459) filed May 17, 1911, for farm unit "H," or the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 28, T. 9 N., R. 6 E., B. H. M., Bellefourche, South Dakota.

The application was rejected for the reason that the lands were withdrawn from all forms of entry under the first form of withdrawal on September 27, 1909, and the withdrawal still remains in force.

The contention made by the applicant, that since the land was formerly covered by an entry made prior to June 25, 1910, which entry was conformed to a farm unit, thereby uncovering the lands embraced in the application, he has a clear right of entry under the act of February 18, 1911 (36 Stat., 917).

Appellant is in error. The act of February 18, 1911, does not apply to lands withdrawn under the first form. Moreover, that act provides that where entries made prior to June 25, 1910, have been or may be relinquished in whole or in part the land so relinquished shall be subject to settlement and entry under the homestead law as amended by the act approved June 17, 1902 (32 Stat., 388). The land applied for was not relinquished by an entryman. That entry being in a reclamation project was conformed to a farm unit leaving the land in question public land but later withdrawn from all forms of entry under the first form.

Finding no sufficient ground for disturbing the action complained of the same must be and it is hereby affirmed.

APOLINARIO ALMANZAR.

Decided May 29, 1912.

SMALL-HOLDING CLAIMS—ACT OF MARCH 3, 1891.

The small-holding act of March 3, 1891, has reference to individual and personal rights of adverse possession, and there is no authority under the act for merging the several and separate adverse claims of a number of persons, claiming as heirs and asserting and maintaining exclusive right and possession to different portions of a tract inherited from a common ancestor, into one claim for the entire tract, either in the names of all of the heirs or in the name of one representing all.

THOMPSON, *Assistant Secretary*:

Appeal is filed by Apolinario Almanzar from decision of August 1, 1911, of the Commissioner of the General Land Office affirming the action of the Surveyor-General for New Mexico in approving United States Surveyor W. B. Douglas's refusal to survey a portion or portions of the lands embraced in said Almanzar's small-holding claim No. 5958, filed February 25, 1910, under the act of March 3, 1891 (26 Stat., 854), and amendatory acts, for a tract of land, described by metes and bounds, lying in sections 15 and 16, T. 14 N., R. 17 E., N. M. P. M., Santa Fe, New Mexico, land district; such refusal being for the stated reason that such portion or portions were never in the possession of said Almanzar.

Almanzar did not, in this claim, allege that any part of the described tract was owned or possessed by others, or purport to claim said tract in any other than his own personal right, stating: "I through myself and my ancestors or grantors have been in actual continuous adverse possession for the past 40 years" of said tract. His proof, however, submitted September 19, 1910, showed he was not then in possession of any of said land; and said surveyor, on undertaking the survey, ascertained that only a portion of said tract had ever been actually possessed by Almanzar, that the remainder thereof had been in the actual possession of others whom Almanzar claims to represent under verbal authority from them for the purpose of partition of said tract, inherited from their common ancestor, Juan Archibeque, who died in 1877, and for the purpose of this claim, they being incapacitated by age and other infirmities, and that all of them, including Almanzar, had been dispossessed since the year 1908 of their several portions of said tract by homestead settlers thereon. Said surveyor surveyed the portion claimed to have been in Almanzar's personal possession prior to that year, and refused, as stated, to survey the remaining portion or portions, not, at any time, in Almanzar's own possession.

The Commissioner holds, in the decision appealed from, that the surveyor's action, approved by the surveyor-general, was proper, and that the persons whom Almanzar claims to represent are now barred from any claim under said acts by the express provision of the act of February 26, 1909 (35 Stat., 655), that any such claim which is not filed prior to March 4, 1910, shall not be valid.

It is stated in this appeal that Almanzar was named by Archibeque in 1877 by a "verbal will", in the presence of all the latter's heirs, executor to partition among said heirs said tract, embraced in this claim, and that said heirs after Archibeque's death confirmed such appointment of Almanzar as executor "by placing in [his] hands * * * the original deed which called for all such land and conferring upon him full authority to do all acts required to be done"

to secure to the several heirs perfect title to their respective portions of said tract.

There is nothing in the record in support of these statements, or to show that Almanzar was agent in fact or law for the alleged owners of the unsurveyed part of the tract claimed, except affidavits by such owners stating they by common consent appointed him, on Archibeque's death, their administrator to partition said tract, and in the latter part of July, 1909, gave him full power and authority to include in his claim, under the above acts, the several portions of said tract claimed by each. There is no proof also of the alleged heirship of Almanzar and of the others interested than his own affidavit as to himself and theirs as to themselves, only, the latter claiming to be the sole heirs.

Irrespective of the question whether a claim under the small-holding law may be filed by an agent duly authorized thereto, it appears that this is an attempt to combine in one claim the several and separate claims of a number who, while holding as heirs of the same ancestor, hold also in adverse possession and claim as to one another different parts of the tract claimed for in its entirety herein. While the entry and possession of one heir upon a tract of land in which the interests of several heirs are undivided is presumptively the entry and possession enuring to the benefit of all, yet where one of such heirs maintains exclusive possession of and claim to a portion of such tract, he assumes thereby the status of an adverse occupant as to such portion as against both the other heirs and the world, which constitutes his claim a separate and distinct claim (*Ricard v. Williams et al.*, 7 Wheat., 59, 120; *Lessee of Clymer et al. v. Dawkins et al.*, 3 How., 674).

The small-holding law provides for the perfection, within a limited time for the filing of applications claiming its benefits, of individual and personal rights of adverse possession, and there is no warrant of law for merging such independent rights of the several occupants of different tracts into one claim for their combined tracts either in the names of all or in the name of one representing all.

The decision appealed from is affirmed.

HENRY SANDERS.

Decided May 29, 1912.

PREFERENCE RIGHT OF CONTESTANT—STATUS OF LAND.

The preference right of entry awarded to a successful contestant is not an absolute and unconditional right to make entry regardless of the status of the land at the time of cancellation of the contested entry, but is only the preferred right, to the exclusion of other applicants, within the preference right period, to make such entry as the land may be subject to at the time he tenders his application.

ENTRY BY SUCCESSFUL CONTESTANT—ACT OF JUNE 22, 1910—COMMUTATION.

Where, at the time a successful contestant makes entry in exercise of the preference right, the land is subject to entry only under the act of June 22, 1910, he is bound by the provisions of that act; and as said act does not authorize commutation of homestead entries made thereunder, commutation of such entry can not be allowed.

THOMPSON, *Assistant Secretary*:

Henry Sanders has appealed to the Department from decision of June 29, 1911, by the Commissioner of the General Land Office rejecting his commutation proof submitted November 17, 1910, on his homestead entry made August 11, 1910, for the SE. $\frac{1}{4}$, Sec. 30, T. 20 N., R. 15 E., B. H. M., Lemmon, South Dakota, land district. The Commissioner ruled that the original entry be left intact subject to future compliance with law.

The proof shows that residence was established on the land in the latter part of August, 1909. At that time the land was embraced in the homestead entry of Patrick Sullivan, which was contested by Sanders and finally canceled, whereupon Sanders made entry as stated in the exercise of his preference right. It is further shown that the land was embraced in Executive order of July 7, 1910, withdrawing the land for coal classification under the provisions of the act of June 25, 1910 (36 Stat., 847), and June 22, 1910 (36 Stat., 583). A notation appears on the homestead application of Sanders to the effect that same is subject to the conditions and limitations of the act of June 22, 1910. The Commissioner held that said entry was subject to the conditions of the said act and that commutation of the entry was not allowable under the law. It is contended that Sanders should be given the benefit of his settlement upon the land prior to the cancellation of the former entry, which settlement was begun prior to the withdrawal. It is therefore urged that Sanders should be accorded the right to commute his entry.

The preference right of entry awarded to a successful contestant is not an absolute and unconditional right to make entry regardless of the status of the land at the time of cancellation of the contested entry. It is only the preferred right, to the exclusion of other applicants, which entitles the contestant within the preference right period to make entry if the land be subject to entry under such application as he shall present, but he can only make such entry as may be appropriate, consideration being given to the status of the land at the time he tenders application. This land at the time of the cancellation of the entry of Sullivan and the presentation of the application of Sanders was subject to entry only under the said act of June 22, 1910, which act does not authorize commutation of a homestead entry. The Commissioner's decision was therefore correct upon the record as it then appeared. But by Executive order of December 1,

1911, the land was freed from the coal withdrawal and restored to entry irrespective thereof, as the land had been classified as noncoal land. It would therefore appear that this entry should be treated as an ordinary homestead entry free from the restrictions and limitations of the said act of June 22, 1910, as that act imposed such conditions only upon lands supposed to be coal lands and such conditions are not now applicable to the land in question.

By instructions of August 7, 1911 (40 L. D., 236), credit for residence upon the land during the time it was embraced in a former entry is authorized where settlement has been made by a contestant who procures cancellation of such former entry and makes entry thereof in his own behalf. Such instructions are confined to cases where such residence had begun prior to September 24, 1910, which is the case here.

In view of the present condition of the record, the decision of the Commissioner rejecting the commutation proof is hereby vacated and the case is remanded for readjudication in accordance with the views herein expressed.

RECLAMATION—SUNNYSIDE UNIT, YAKIMA PROJECT.

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,
Washington, May 31, 1912.

In pursuance of the provisions of section 4 of the act of Congress approved June 17, 1902 (32 Stat., 388), notice is hereby given as follows:

1. Water will be furnished from the Sunnyside unit, Yakima project, Washington, under the provisions of the Reclamation Act in the irrigation season of 1912, for irrigable lands shown on farm unit plats of T. 9 N., R. 25 E., and Ts. 10 and 11 N., R. 21 E., Willamette Meridian, approved by the Secretary of the Interior May 22, 1912, and on file in the local land office at North Yakima, Washington.

2. A list showing all lands ready for irrigation in the Sunnyside unit was filed with public notice of February 29, 1912, and a supplementary and amendatory list has been filed in the local land office showing additional areas which will be irrigated in 1912 and subsequent years and amendments of the prior list.

3. Homestead entries under the provisions of the Reclamation Act accompanied by applications for water rights and the first instalment of the charges for building, operation and maintenance may be made

on and after June 15, 1912, for the following public land farm units, shown on said plats and list, viz:

<i>Farm Unit</i>	<i>Section</i>	<i>T. N.</i>	<i>R. E.</i>
G	20	9	25
H	20	9	25
D	2	10	21
E	2	10	21
H	2	10	21
C	2	10	21
F	2	10	21
G	2	10	21
A	2	10	21
B	2	10	21

The second instalment shall be due on March 1st of the following year and subsequent instalments shall become due on March 1st of each year thereafter, until fully paid.

4. A large proportion of the above lands are above gravity flow from the system of the Sunnyside unit and entrymen must assume all responsibility for raising water from said system to the land to be irrigated. Such fact shall not, however, affect the charges to be paid to the United States for water rights under the said unit.

5. Warning is hereby expressly given that no person will be permitted to gain or exercise any right whatever under any settlement or occupation begun prior to July 15, 1912, on any of the above described farm units, provided, however, that this shall not interfere with any valid existing rights obtained by settlement or entry while the land was subject thereto.

6. For lands in private ownership and lands heretofore entered, the first instalment shall become due on June 1, 1912, and subsequent instalments on March 1st of each calendar year thereafter until fully paid.

7. Except as otherwise provided herein, homestead entries, applications for water rights, the charges, time and manner of payments, shall be governed by the terms of the public notices of March 15, 1911, and February 29, 1912 [40 L. D., 437], for the Sunnyside unit.

SAMUEL ADAMS,

First Assistant Secretary of the Interior.

ALASKA COMMERCIAL COMPANY.

Decided June 1, 1912.

ALASKAN LANDS—OCCUPANCY AND IMPROVEMENT—SOLDIERS' ADDITIONAL LOCATION.

A valid right under the act of May 17, 1884, based upon possession and use of land in the District of Alaska prior to date of that act, may be perfected by and merged into a soldiers' additional right located upon such land, in the absence of a reservation or withdrawal embracing and attaching to said land.

DEPARTMENTAL DECISION ON APPEAL RECALLED AND VACATED.

Departmental decision of March 21, 1911, 39 L. D., 597, recalled and vacated.

ADAMS, *First Assistant Secretary*:

The Alaska Commercial Company has filed a petition for review, in the nature of a petition for the exercise of the Department's supervisory authority, in the matter of said company's application for survey No. 562, preliminary to the location of a soldiers' additional homestead right, of a tract of land situated near the town of Kadiak, on Kadiak Island, Alaska, which was suspended by the Commissioner of the General Land Office November 3, 1910, affirmed by the Department March 21, 1911 (39 L. D., 597), for conflict in part with a temporary reservation made by Executive order March 28, 1898, for the use of the Department of Agriculture as an experimental station, said company being required to eliminate from its claim the part in conflict.

It appears that when the survey of the tract thus reserved under said order was made, a protest by said company was made August 13, 1898, setting forth its possession, use and occupation, principally for pasturage purposes, of a tract stated to be under fence since 1883. Said reservation comprised 160 acres of land more or less, and appears to include about one-half or more of said tract now claimed by said company under said survey No. 562, which was made, pursuant to the application of said company, in the year 1909, the tract embracing 23.90 acres, which was stated by the deputy surveyor making said survey to have been in the possession of the claimant and its grantors since before the Alaska purchase.

The Commissioner in said decision of November 3, 1910, held that "no valid existing claim is believed to have existed to interfere with the Executive order" so far as said Alaska Commercial Company is concerned. The Department in its said decision held that, admitting that said company had been in undisturbed possession of the tract claimed prior to and ever since the act of May 17, 1884 (23 Stat., 24), said company acquired by such occupancy no vested right against the United States either under that act or any other law; further, that prior occupancy and improvement of the land cannot

avail as the initiation of a claim under an application to locate a soldiers' additional right.

The Department has carefully reviewed the record herein, together with the contentions and arguments presented. It appears that neither the Commissioner in the decision appealed from nor the Department in its said decision of March 21, 1911, made any mention of the proviso attached to said Executive order that—

The temporary reservation above described shall not interfere with any prior rights of the natives or others to land within said reservation.

Said act of May 17, 1884, providing for the civil government of the District of Alaska, also provides that—

Indians, or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.

It has been held that this proviso guarantees to such prior users or occupants their possession of such lands and the future acquirement of title thereto under such laws as Congress may enact. *Young v. Goldsteen* (97 Fed., 303) ; *Baranof Island* (36 L. D., 261).

If said Alaska Commercial Company therefore has been in the possession and had the use of the tract claimed by it since 1883 as alleged, said tract is, by the express terms of said reservation, excepted from its purview and operation, and the rights of said company, as guaranteed by said act of May 17, 1884, are not affected thereby.

At the date of said Executive order there was no law under which title to public lands lying within the District of Alaska might be perfected. Subsequently, by the act of May 14, 1898 (30 Stat., 409), "the homestead land laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights," were extended to the District of Alaska subject to such regulations as might be made by the Secretary of the Interior.

While occupancy and improvement of land can not of itself avail as the initiation of a claim to locate a soldiers' additional right, yet a valid right under said act of May 17, 1884, based upon possession and use of land prior to the date of that act, is such right as may be perfected by and merged into a soldiers' additional right located upon such land, in the absence of a reservation or withdrawal embracing and attaching to said land.

There does not appear in this case any sufficient or satisfactory proof of the alleged occupancy and use by said Alaska Commercial Company of the land claimed by it since 1883 as alleged. This case

is therefore remanded for hearing with direction that said company be called upon to furnish proof of its allegations and that the Department of Agriculture be notified of its right to appear at such hearing and make such counter showing as it may see fit; with such further instructions as the Commissioner may deem necessary in the premises.

This petition is therefore entertained and the decision herein of March 21, 1911. is recalled and vacated.

PARAGRAPH 33 OF MINING REGULATIONS AMENDED.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

Washington, June 4, 1912.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Paragraph 33 of the regulations, approved March 29, 1909 (37 L. D., 728), under the mining laws of the United States, is hereby amended to read as follows:

In order that the conditions imposed by the proviso, as set forth in the above paragraph, may duly appear, the application for patent must contain or be accompanied by a specific statement under oath by each person whose name appears therein that he never has, either as an individual or as a member of an association, located or entered any other lands under the provisions of this act. The application for patent should also be accompanied by a showing under oath, fully disclosing the qualifications as defined by the proviso, of the applicants' predecessors in interest.

Very respectfully,

SAMUEL ADAMS,
First Assistant Secretary.

HERMAN H. PETERSON ET AL.

Motion for rehearing of departmental decision of March 5, 1912, 40 L. D., 562, denied by First Assistant Secretary Adams, June 7, 1912.

MARSH v. RAMBOUSEK.

Motion for rehearing of departmental decision of March 1, 1912, 40 L. D., 559, denied by Assistant Secretary Thompson, June 8, 1912,

GEORGE L. STERNS ET AL.

Decided June 8, 1912.

RED LAKE INDIAN LANDS—ACT OF FEBRUARY 16, 1912.

By use of the word "hereafter" in the act of February 16, 1911, providing for the disposal of the undisposed-of Red Lake Indian lands, Congress intended that such lands should be open to entry immediately upon approval of that act.

DEPARTMENTAL INSTRUCTIONS OF MARCH 3, 1911, MODIFIED.

Instructions of March 3, 1911, 39 L. D., 540, under the act of February 16, 1911, modified, in so far as they fixed dates subsequent to the date of the act for the allowance of settlements and entries upon the lands thereby opened to disposal.

ADAMS, *First Assistant Secretary*:

February 20, 1911, George L. Sterns filed homestead application for the NW. $\frac{1}{4}$, Sec. 25, T. 154 N., R. 43 W., 5th P. M., Crookston, Minnesota, land district, which was rejected by the local officers for the reason that the land was withdrawn by Commissioner's letter of October 18, 1909, and by reason of the prior rejected application of Peder E. Olson for the same land.

By decision of June 5, 1911, the Commissioner of the General Land Office affirmed the action of the local officers rejecting the application. An appeal from the latter action has brought the case before the Department for consideration.

The land in question is a part of the Red Lake Indian Reservation opened to entry under the act of February 20, 1904 (33 Stat., 46), and a portion of the undisposed of lands under that act which were again opened to homestead entry under the provisions of the act of February 16, 1911 (36 Stat., 913). The latter act reads as follows:

That hereafter all lands ceded under the act entitled "An act to authorize the sale of what is known as the Red Lake Indian Reservation, in Minnesota," approved February twentieth, nineteen hundred and four, and undisposed of, shall be subject to homestead entry at the price of four dollars per acre, payable as provided in section three of said act, for all lands not heretofore entered; and for all lands embraced in canceled entries the prices shall be the same as that at which they were originally entered: *Provided*, That where such entries have been or shall hereafter be canceled pursuant to contests, the contestant shall have a preference right to enter the land embraced in such canceled entry, as prescribed in the act of July twenty-sixth, eighteen hundred and ninety-two: *Provided further*, That all lands entered under this act shall, in addition to the payments herein provided for, be subject to drainage charges, if any, authorized under the act entitled "An act to authorize the drainage of certain lands in the State of Minnesota," approved May twentieth, nineteen hundred and eight. (Twenty-seventh Statutes, page two hundred and seventy.)

The said act of February 20, 1904, provided that all such lands which remained unsold at the expiration of five years from the date of the first sale thereunder should be offered for sale at not less than

\$4 per acre, and any lands remaining unsold after such sale should be subject to private entry at said price without any conditions whatever except the payment of the purchase price.

The period of five years having elapsed after the first sale under said act, the Commissioner by letter of October 18, 1909, instructed the local officers to discontinue the allowance of homestead entries for said lands with a view to the public sale thereof as provided by the said act. By departmental letter of October 12, 1910, the public sale of the undisposed of lands was postponed pending legislation by Congress in the premises.

Under date of March 3, 1911, instructions to the local officers were approved by the Secretary of the Interior under the said act of February 16, 1911, advising them of the provisions of that act, giving a list of the lands for disposal thereunder, revoking the prior instructions removing the lands from homestead entry, and also fixing as the date for allowance of settlement on said lands April 15, 1911, and the date for allowance of entries May 15, 1911, and directing that notice of such opening be given to the newspapers as a matter of news. See 39 L. D., 540.

At the time Sterns applied to make entry the lands were withdrawn from homestead entry according to the records of the local land office and therefore the local officers rejected the application. Also it appears that Peder E. Olson on February 15, 1911, filed a homestead application which was on the same day rejected, and from which rejection Olson appealed. However, Olson has since withdrawn his said application and made entry of the land on May 15, 1911, under the foregoing instructions, which entry is still intact.

Sterns claims that inasmuch as his application was filed before the issuance of said instructions, his application comes strictly under the provisions of the said act of February 16, 1911, and is not governed by the said instructions. The Commissioner held that the action taken rejecting the application was in accordance with said instructions, and he accordingly affirmed the action of the local officers.

The applicant insists that the word "hereafter" as used in the said act of February 16, 1911, had the effect of immediately opening the lands to entry upon approval of that act, and that inasmuch as he was the first applicant to apply after the date of that act, his application should be accepted.

It must be held that by use of the word "hereafter" in the act, Congress intended to open the lands to entry at once upon approval of the act. At that time the land was being withheld from entry because the period for operation of the prior law had expired. The act under consideration again restored the land to entry, and it became operative from the date of its enactment.

The first application of Olson was filed prior to the date of said act and at a time when the land was not subject to entry. Therefore, said application was a nullity. He afterwards made entry on May 15, 1911, based upon a new application, but prior thereto Sterns had filed his application, which was pending on appeal. Olson's entry was erroneously allowed and it is hereby held for cancellation. He will be allowed thirty days from notice to show cause why his entry should not be canceled. This is a right always accorded a person whose entry is held for cancellation.

Upon cancellation of the entry of Olson, Sterns will be permitted to make entry unless other objection appear.

The decision appealed from is reversed and the case is remanded to the General Land Office for action as here indicated.

This modifies the instructions of March 3, 1911, *supra*, as stated.

OKLAHOMA PASTURE LANDS—EXTENSION OF TIME FOR PAYMENT—ACT APRIL 27, 1912.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, June 8, 1912.

REGISTER AND RECEIVER,

United States Land Office,

Guthrie, Oklahoma.

GENTLEMEN: Your attention is directed to the act of Congress approved April 27, 1912, entitled "An act authorizing the Secretary of the Interior to subdivide and extend the deferred payments of settlers in the Kiowa-Comanche and Apache ceded lands in Oklahoma," and reading as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and directed to subdivide into two parts each of the deferred annual payments on lands heretofore sold and entered under the Act entitled "An Act to open to settlement five hundred and five thousand acres of land in the Kiowa-Comanche and Apache Indian Reservations in the State of Oklahoma, approved June sixth [*fifth*], nineteen hundred and six," and the Act entitled "An Act giving preference rights to settlers on the Pasture Reserve numbered three to purchase land leased to them for agricultural purposes in Comanche County, Oklahoma," approved June twenty-eighth, nineteen hundred and six, and extend the time of payment from the date on which each payment so divided becomes due under existing law: *Provided*, That one of the parts into which each deferred annual payment is sub-divided shall be paid annually thereafter until the entire amount due is paid, and that not more than one of such parts shall be required to be paid annually: *Provided*, That all interest due on such deferred payments

on the date of the passage and approval of this act shall be added to the principal, become a part thereof, and, together with all deferred payments, bear interest at the rate of four per centum per annum until paid: *Provided further*, That no patent or specie of title shall pass until all payments and interest are paid in full: *And provided further*, That full discretion is vested in the Secretary of the Interior to refuse an extension for fraud of the purchasers under the above-named acts.

(1) This act provides that each of the deferred annual payments on lands entered under the act of June 5, 1906 (34 Stat., 213), and the act of June 28, 1906 (34 Stat., 550), be divided into two parts, and that extension of time for making same be granted; that one of these parts shall be paid annually thereafter until the entire amount is paid, and that no patent shall issue until all the payments have been made in full. The amount of each installment is to be computed, with interest as provided by existing laws, down to the approval of the present act. See acts above named, and those of March 11, 1908 (35 Stat., 41), February 18, 1909 (35 Stat., 636), and March 26, 1910 (36 Stat., 265); also the regulations found in 35 L. D., 139 and 239, 36 L. D., 310, 37 L. D., 517, and 38 L. D., 545. The sums so fixed will be subdivided as indicated, and will bear interest at four per cent per annum, from the date of the act until paid.

(2) All installments of the price of these lands, unpaid at the date of the act, are subdivided under its terms, and an extension of time is granted; that is, of one year after said date for the payment of one-half of the first unpaid installment, and of two years for payment of the other half thereof. A year after the time for said second payment, the first half of the next installment is payable, and so on until the entire amount is paid. For example, in cases where only the original payment has been made, the other four installments are divided into eight parts, due respectively on April 27th of the years 1913 to 1920, inclusive, interest on each being paid at its maturity. Where the sum remaining unpaid at the date of the act was less than the amount of one installment of the purchase price, it will be treated as a single installment and be divided into two parts.

(3) There is no provision requiring submission of proof on the homestead entries before full payment has been made for the land; the time for such submission is, by implication, extended in each case until the final payment falls due. However, where the entryman has complied with the law as to residence and cultivation for the required period, he may submit his final proof, and, if satisfactory, he will be notified to that effect and further residence or cultivation will not be necessary, but no final certificate or patent will be issued until full payment of the purchase price shall have been made.

(4) It will not be necessary for the parties to file applications for the benefit of this act, but the failure of any claimant to make such

payments as may be due, will be held to show his acceptance of its provisions. However, any or all installments may be paid at any time before they become due, with interest to date of payment.

(5) The act vests in the Secretary of the Interior full discretion to refuse an extension on account of fraud upon the part of the entrymen; this office may, therefore, under the direction of the Secretary of the Interior, deprive an entryman of the benefits of the act, where it is shown to the satisfaction of the Department that he has been guilty of fraud in connection with his claim.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

ALBERT A. BANDY.

Decided June 8, 1912.

ASSIGNMENT OF DESERT-LAND ENTRY—RIGHTS OF ASSIGNEE.

By taking an assignment of a desert-land entry the assignee is substituted for the original entryman, and his rights under the entry are the same that they would have been had he made the entry in the first instance.

SECOND DESERT-LAND ENTRY—ASSIGNEE—ACT OF FEBRUARY 3, 1911.

The assignee of a desert-land entry, otherwise qualified, has the same right of second entry based thereon, under the act of February 3, 1911, that the original entryman would have had if no assignment had been made, regardless of whether the assignment to him was made prior or subsequent to the date of the act.

ADAMS, *First Assistant Secretary:*

Albert A. Bandy has appealed from decision of January 16, 1912, of the Commissioner of the General Land Office, holding for cancellation his desert-land entry made October 3, 1911, for the SW. $\frac{1}{4}$, Sec. 15, T. 24 S., R. 45 W., containing 160 acres, made at the Lamar, Colorado, land office, the same being a second entry under the provisions of the act of February 3, 1911 (36 Stat., 896).

It appears that Lee Bailey made desert-land entry on October 21, 1910, for the said tract, which was assigned by him to Albert A. Bandy on April 8, 1911. Bandy relinquished the entry and made the second entry for the same tract as above stated.

The Commissioner held that said second entry was illegal, inasmuch as Bandy had exercised his desert-land right by taking the said assignment subsequently to the date of the act of February 3, 1911, *supra*, which provides for the allowance of a second exercise of the

desert-land right under certain circumstances. Said act reads as follows:

That any person who, prior to the approval of this act, has made entry under the homestead or desert-land laws, but who, subsequently to such entry, from any cause shall have lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead or desert-land laws as though such former entry had not been made, and any person applying for a second homestead or desert-land entry under this act shall furnish a description and the date of his former entry: *Provided*, that the provisions of this act shall not apply to any person whose former entry was canceled for fraud, or who relinquished his former entry for a valuable consideration in excess of the filing fees paid by him on his original entry.

Section 15 of instructions of September 30, 1910 (39 L. D., 253, 259), referring to the amendatory act of March 28, 1908 (35 Stat., 52), reads in part as follows:

The act of March 28, 1908, also provides that no person may take a desert-land entry by assignment, unless he is qualified to enter the tract so assigned to him. Therefore, if a person is not a resident citizen of the State or Territory wherein the land involved is located, or, if he has made a desert-land entry in his own right, he can not take such an entry by assignment. The language of the act indicates that the taking of an entry by assignment is equivalent to the making of an entry, and this being so, no person is allowed to take more than one entry by assignment. The desert-land right is exhausted either by making an entry or by taking one by assignment.

When an assignee takes a desert-land entry by assignment he not only exhausts his right under the desert-land law precisely the same as if he made the initial entry, but he also assumes the burdens as well as the benefits of such entry and is obliged to comply with the requirements of law within the statutory period as fixed by the date of the entry, not by the date of the assignment. While his right under the entry is first initiated by the assignment, it relates back when so initiated to the date of the entry. He assumes the burdens as fixed by that date and hence should be accorded whatever benefits issue therefrom. By assignment, the entry becomes his entry and the date thereof is the date when it was first made. This is believed to be the correct technical analysis of the subject, but even if, through refined reasoning, it were found difficult to construe the law so as to accord the right of second entry under the circumstances here shown, it would still appear that the act of February 3, 1911, being remedial in character should be liberally construed, and under such liberal interpretation it would seem to be without question that the entry here involved was properly allowed.

The decision appealed from is accordingly reversed.

THREE-YEAR HOMESTEAD—ACT OF JUNE 6, 1912.**CIRCULAR.**

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, June 10, 1912.

SIR: There is printed below a copy of an act passed by Congress, and signed by the President on June 6, 1912, amending sections 2291 and 2297 of the Revised Statutes of the United States relating to homesteads and homestead entries. I call your particular attention to the last proviso to section 2291, reading as follows:

Provided, That the Secretary of the Interior shall, within sixty days after the passage of this act, send a copy of the same to each homestead entryman of record who may be affected thereby by ordinary mail to his last known address, and any such entryman may, by giving notice within one hundred and twenty days after the passage of this act, by registered letter to the register and receiver of the local land office, elect to make proof upon his entry under the law under which the same was made without regard to the provisions of this act.

If you wish to elect to make proof upon your entry under the law under which the same was made, you must give notice thereof within 120 days after June 6, 1912, *to the register and receiver of the local land office*. This notice must be sent by *registered* mail and may not be sent in any other way. [See circular of June 29, 1912, 41 L. D., 99.] If, in your case, you desire to make proof under the law under which you made your entry, there is, for your convenience, inclosed herewith a printed notice of election, which you may fill out and use for that purpose.

Unless you elect in the manner and form and within the time above stated your entry will, without notice, become subject to the provisions of said act of June 6, 1912; and in reaching a decision as to which course you prefer you should first carefully examine the provisions and requirements of the new act printed herewith.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

WALTER L. FISHER, *Secretary*.

ELECTION TO MAKE PROOF UNDER LAW UNDER WHICH ENTRY WAS MADE.

Act of June 6, 1912 (Public, No. 179).

(Place.)

(Date.)

REGISTER AND RECEIVER,
United States Land Office,

(Place.)

SIRS: On ——— I made Homestead Entry No. ———, for ——— Sec. ———, T. ———, R. ———, ——— Meridian.

Under the privilege allowed by section 2291, U. S. R. S., as amended by the act of June 6, 1912 (Public, No. 179), I hereby give notice that I elect to make proof on said entry under the law under which the same was made.

My post-office address is ———.

(Sign name in full.)

[Public—No. 179.]

An act to amend section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven of the Revised Statutes of the United States relating to homesteads.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven of the Revised Statutes of the United States be amended to read as follows:

"SEC. 2291. No certificate, however, shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry her heirs or devisee, in case of her death, proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law: *Provided*, That upon filing in the local land office notice of the beginning of such absence, the entryman shall be entitled to a continuous leave of absence from the land for a period not exceeding five months in each year after establishing residence, and upon the termination of such absence the entryman shall file a notice of such termination in the local land office, but in case of commutation the fourteen months' actual residence as now required by law must be shown, and the person commuting must be at the time a citizen of the United States: *Provided*, That when the person making entry dies before the offer of final proof those succeeding to the entry must show that the entryman had complied with the law in all respects to the date of his death and that they have since complied with the law in all respects, as would have been required of the entryman had he lived, excepting that they are relieved from any requirement of residence upon the land:

Provided further, That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry, and until final proof, except that in the case of entries under section six of the enlarged-homestead law double the area of cultivation herein provided shall be required, but the Secretary of the Interior may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation: *Provided*, That the above provision as to cultivation shall not apply to entries under the act of April twenty-eighth, nineteen hundred and four, commonly known as the Kinkaid Act, or entries under the act of June seventeenth, nineteen hundred and two, commonly known as the reclamation act, and that the provisions of this section relative to the homestead period shall apply to all unperfected entries as well as entries hereafter made upon which residence is required: *Provided*, That the Secretary of the Interior shall, within sixty days after the passage of this act, send a copy of the same to each homestead entryman of record who may be affected thereby, by ordinary mail to his last known address, and any such entryman may, by giving notice within one hundred and twenty days after the passage of this act, by registered letter to the register and receiver of the local land office, elect to make proof upon his entry under the law under which the same was made without regard to the provisions of this act."

"SEC. 2297. If, at any time after the filing of the affidavit as required in section twenty-two hundred and ninety and before the expiration of the three years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government: *Provided*, That the three years' period of residence herein fixed shall date from the time of establishing actual permanent residence upon the land: *And provided further*, That where there may be climatic reasons, sickness, or other unavoidable cause, the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe."

Approved, June 6, 1912.

MARQUIS D. LINSEA.

Decided June 11, 1912.

RECLAMATION HOMESTEAD—DEFAULT IN PAYMENT—FORFEITURE.

The provision in section 5 of the reclamation act that failure to make payment of any two annual installments when due shall render the entry subject to cancellation, with forfeiture of all rights under the act, is not mandatory, but it rests in the sound discretion of the Secretary of the Interior whether the entryman in such case may thereafter be permitted to cure his default by payment of the water charges, where he has continued to comply with the provisions of the homestead law; and in event an entry has been canceled for such failure, the Secretary may, in the absence of adverse claim, authorize reinstatement thereof with a view to permitting the entryman to cure his default.

ADAMS, *First Assistant Secretary*:

This appeal is filed by Marquis D. Linsea from a decision of the General Land Office, denying his application for reinstatement of his homestead entry of farm unit "E," in the Truckee-Carson irrigation project, being the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 13, T. 19 N., R. 30 E., Carson City, Nevada.

The entry was made August 23, 1907, and water was delivered to the entryman March 30, 1908. Linsea applied to have the first payment declared due December, 1909, alleging that, in the year 1908, he sowed to grain and garden about 35 acres of ground believing that he would be able to obtain water for irrigation during that year, but no water could be furnished for the reason that the takeout designated by the government officials was not high enough to furnish water on said ground, and he lost his crop and seed sown by reason of being unable to obtain water during that year.

His application was referred to the Reclamation Service, which, by letter of May 4, 1910, reported against the allowance of said application, stating that an adequate supply of water was delivered to Linsea during the season of 1908 and that, while it is true the takeout originally placed in the main lateral was too low to irrigate a good portion of the land, it was discovered early in the season and Linsea was allowed to use another takeout sufficiently high to cover all the land of his claim during the season of 1908. According to the Reclamation Service crop report, he had 25 $\frac{3}{4}$ acres under irrigation.

June 9, 1910, the General Land Office acted upon the report of the Reclamation Service and directed that Linsea be notified he would be allowed sixty days in which to make payment of the installment of the year 1908 and that, in default of such action, his entry would be canceled, without further notice.

Linsea having failed to make such payment, his entry was canceled by the General Land Office October 6, 1910.

March 11, 1911; he applied to have his entry reinstated, alleging that he has continuously resided on the premises ever since his entry, and still resides thereon; that he is a poor man and must earn his living as best he can from his daily labor; that he has a family, consisting of his wife and five children; that he is now fifty-two years of age, in very poor health, and it is almost an impossibility to meet the water payments on said land as they become due; that, after years of hard labor and expense, he has placed his land in a condition where he can obtain some returns therefrom and is now in a condition to meet the requirements of the Government as to water payments; that he has now more than fifty acres of land cleared, leveled, and in condition to produce crops; that he has built a house on the premises, consisting of four rooms, besides building corral and putting in a well. He alleges that, July 8, 1910, he became very

sick and continued so until December, 1910, during which time he was unable to attend to business; that, on account of said sickness and the great expense incurred thereby, he was unable to make the water payments, but is now willing to do so, if he be permitted; that it is his intention to retain the homestead for his future home, and, if deprived of it, he will be thrown out into the world destitute and without a home for himself and family.

Section 5 of the Reclamation Act of June 17, 1902 (32 Stat., 388), provides that failure to make any two payments of the annual installment when due shall render the entry subject to cancellation, with the forfeiture of all rights under the act. By such default, the entry becomes subject to cancellation and the forfeiture of all right under the act. But it is not imperative that it should be canceled or a forfeiture declared. It rests within the sound discretion of the Secretary of the Interior as to whether the entryman may thereafter be permitted to cure such default by payment of the water charges, if he or she has continued to comply with the provisions of the homestead law.

If the allegations in Linsea's petition are corroborated by satisfactory proof and he discharges all the obligations demanded by the act by payment of the annual installment due up to December 1, 1911, it would seem that this is a very proper case for the exercise of the supervisory authority of the Secretary of the Interior.

If the land has not been entered by another, you will direct the local officers to notify Linsea that, upon the payment of the annual installment due up to and including December 1, 1911, and upon submission of satisfactory proof showing full compliance with the homestead law up to the present time, his entry will be reinstated. If the land is now covered by a lawful entry, or the conditions above mentioned are not complied with, the petition will be denied.

The decision of the General Land Office is modified accordingly.

RECLAMATION—TRUCKEE-CARSON PROJECT—WATER SERVICE.

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,
Washington, June 13, 1912.

In pursuance of the provisions of section 4 of the Reclamation Act of June 17, 1902 (32 Stat., 388), notice is hereby given that water will be furnished from the Truckee-Carson project, Nevada, under the provisions of the Reclamation Act, beginning with the irrigation season of 1912, for the lands hereinafter listed and described:

Mount Diablo Meridian.

T. 17 N., R. 29 E.	Irrigable Area.
Sec. 8, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ -----	40 acres.
T. 19 N., R. 31 E.	
Sec. 18, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ -----	38 acres.
Sec. 17, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ -----	38 acres.
T. 20 N., R. 26 E.	
Sec. 26, farm unit "H"-----	79 acres.

The suspension by order dated September 16, 1910, of public notices theretofore issued and of farm unit plats theretofore filed for said project, is hereby revoked and annulled as to the lands above listed in so far as the same are affected thereby.

Homestead entries, applications for water rights, the charges, time and manner of payments, shall be governed by the terms of the public notices and orders heretofore issued, except that the first installment of the charges for building, operation and maintenance shall become due December 1, 1912.

SAMUEL ADAMS,
First Assistant Secretary of the Interior.

SELECTIONS BY STATES OF LANDS WITHDRAWN, CLASSIFIED, OR VALUABLE FOR COAL.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, June 14, 1912.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Your attention is directed to the act of Congress approved April 30, 1912 (Public, No. 141), entitled "An act to supplement the act of June twenty-second, nineteen hundred and ten, entitled 'An act to provide for agricultural entries on coal lands.'" a copy of which is hereto attached.

The act of June 22, 1910 (36 Stat., 583), entitled "An act to provide for agricultural entries on coal lands," provided that the public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert land law in tracts not exceeding 160 acres, to selection under section 4 of the act approved August 18, 1894 (28 Stat., 422), known as the Carey Act, and to withdrawal under

the act approved June 17, 1902 (32 Stat., 388), known as the reclamation act.

By this act (April 30, 1912), the privileges granted in certain cases, as enumerated above, by the act of June 22, 1910, *supra*, are extended to the several States in making selections of lands in satisfaction of grants made by Congress. It is further provided that the Secretary of the Interior may, in his discretion, dispose of any isolated or disconnected tracts, under the laws providing for the sale of such tracts of public land. The conditions and reservations as prescribed by the former act are embodied in this act unchanged.

It will be your duty to accept, subject to future approval, selections, otherwise unobjectionable, presented by the several States in satisfaction of congressional grants, embracing lands withdrawn or classified as coal lands, or valuable for coal, if accompanied by a certificate or statement, in case of each application to select, of the officer or officers authorized to act for and in behalf of the State, to the effect that the application is made in accordance with, and subject to, the provisions and reservations of the act of June 22, 1910 (36 Stat., 583), as supplemented by the act of April 30, 1912 (Public, No. 141).

Should the State deny the existence of coal in the land sought to be selected you will proceed in accordance with existing regulations in such cases.

In relation to selections made by some of the States, prior to the passage of this act, of lands withdrawn or classified as coal, you are informed that the department held, under date of May 18, 1912, in such a case from Wyoming (Lander, 05040), on appeal, as follows:

The tender or filing of a school-land indemnity selection by a State in lieu of lands lost by it in place constitutes a mere offer to exchange, confers no vested right upon the selector and does not prevent the taking or withholding of the land by the United States for public uses or purposes. The transaction is not complete, nor does the right of the State vest until the acceptance and approval of the offer of exchange by the Secretary of the Interior. School indemnity selections offered by States for lands classified as coal or known to be valuable for such deposits could not, prior to April 30, 1912, be accepted or approved; but these selections offered and pending at the date of passage of the act of April 30, 1912, may, in the absence of intervening adverse rights, and upon proper election filed by the States, now be allowed and accepted as of April 30, 1912, if there be no other objection.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

SAMUEL ADAMS,
First Assistant Secretary.

[PUBLIC—No. 141.]

AN ACT To supplement the act of June twenty-second, nineteen hundred and ten, entitled
"An act to provide for agricultural entries on coal lands."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act

unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands or are valuable for coal shall, in addition to the classes of entries or filings described in the act of Congress approved June twenty-second, nineteen hundred and ten, entitled "An act to provide for agricultural entries on coal lands," be subject to selection by the several States within whose limits the lands are situate, under grants made by Congress, and to disposition, in the discretion of the Secretary of the Interior, under the laws providing for the sale of isolated or disconnected tracts of public lands, but there shall be a reservation to the United States of the coal in all such lands so selected or sold and of the right to prospect for, mine, and remove the same in accordance with the provisions of said act of June twenty-second, nineteen hundred and ten, and such lands shall be subject to all the conditions and limitations of said act.

Approved, April 30, 1912.

OIL LOCATIONS MADE PRIOR TO ACT OF MARCH 2, 1911.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, June 15, 1911.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES,
AND CHIEFS OF FIELD DIVISION.

SIRS: The Secretary in a communication to this office dated May 17, 1911, instructed that the act of March 2, 1911 (36 Stat., 1015), should be brought to the attention of the local officers with the direction that, upon the presentation of every case within the purview of the act, they shall:

Advise the chiefs of field division, in order that the latter may make such field examinations as are advisable or necessary, particularly if the land involved has been embraced in a withdrawal, as to the time when the development work was begun, and be prepared to submit the results, if possible, before entry is allowed. Each such case will be considered and adjudicated upon its record in the regular manner.

Observing that the operation of the act is retrospective only, being confined to locations made prior to the date thereof, you will, upon the presentation of any application for patent affected by the provisions of said act, immediately communicate to the proper chief of field division due and full information thereof, to the end that he may procure to be made such investigations as may be necessary to ascertain the facts concerning the inception and subsequent prosecution of development operations, the extent and character of such works, and any other facts bearing upon and affecting the validity of the claim, including the continuousness and diligence with which development proceeded from the date of inception.

Report made of the results of such examinations will be submitted to this office, upon receipt of which the local officers will be advised as to the action to be taken.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved July 11, 1912:

SAMUEL ADAMS,
First Assistant Secretary.

**RECLAMATION—NORTH PLATTE PROJECT—WATER SERVICE
FOR 1912.**

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,
Washington, June 24, 1912.

In pursuance of section 4 of the Reclamation Act of June 17, 1902 (32 Stat., 388), notice is hereby given that water will be furnished from the North Platte project during the irrigation season of 1912 and thereafter for the irrigable lands in the third lateral district shown upon farm unit plat of T. 26 N., R. 62 W., 6th P. M., approved October 19, 1911, on file at the local land office at Cheyenne, Wyoming, subject to the same charges, terms and conditions as are prescribed in public notice dated March 14, 1912 (40 L. D., 504), for lands opened to irrigation in 1911, and orders and notices supplementary thereto or amendatory thereof.

SAMUEL ADAMS,
First Assistant Secretary of the Interior.

**RECLAMATION — BUFORD-TRENTON PROJECT — EXTENSION OF
TIME FOR PAYMENT.**

ORDER.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, June 25, 1912.

Whereas, in pursuance of the order of May 13, 1911, water was furnished in the season of 1911 to lands under the Buford-Trenton project, North Dakota, constructed under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and

Whereas, the said order stated the charges, terms and conditions under which water would be furnished during the seasons of 1911, 1912 and 1913, and

Whereas, a number of settlers or land owners are financially unable to pay the charges in said order announced for the seasons of 1911 and 1912, but are desirous of obtaining water for the season of 1912,

Therefore, it is hereby ordered that any such settler or land owner who in good faith has actually cultivated or improved his land and has alfalfa growing or seeded, or land cultivated and prepared for seeding, may obtain water for the season of 1912 upon the following conditions:

1. By filing with the project engineer application and affidavit on the form hereinafter set forth, which must be corroborated by two disinterested persons upon information and belief:

APPLICATION FOR EXTENSION OF TIME FOR PAYMENT OF 1911 OPERATION AND MAINTENANCE CHARGES.

I, _____, owner or entryman of _____ Sec. _____ T. _____ N., R. _____ W., containing _____ irrigable acres, do hereby apply for extension of time to December 1, 1912, for payment of the remainder of the charges for 1911, amounting to \$1.00 per acre for operation and maintenance and \$1.00 per acre-foot for all water delivered.

I have made the following progress in the cultivation of the soil: _____

I have placed upon the land the following improvements: _____

If this application is allowed, I hereby agree to pay, on or before December 1, 1912, as the balance of the increased charge, \$1.10 per acre (in lieu of \$1.00) for operation and maintenance for 1911, and \$1.10 per acre-foot for all water delivered in 1911; and, at the same time, an increased charge for 1912, aggregating \$1.55 per acre for operation and maintenance, and \$1.00 per acre-foot for all water delivered in 1912.

Applicant.

AFFIDAVIT BY APPLICANT.

STATE OF NORTH DAKOTA, }
County of Williams, } ss:

_____, of the _____ of _____ county of _____, and State of North Dakota, being duly sworn, deposes and says that he is unable to make payment of the 1911 water charges at the present time, and that the statements contained in his application for extension of time for such payments are true.

Subscribed and sworn to before me, this _____ day of _____, 1912.

My commission expires _____, 19—.

CORROBORATION OF APPLICANT'S STATEMENTS BY TWO DISINTERESTED PERSONS.

1.

STATE OF NORTH DAKOTA, }
County of _____, } ss:

_____, of the _____ of _____, county of _____, and State of North Dakota, being duly sworn, deposes and says that he has read the statements

contained in the foregoing application and affidavit of _____, and that they are true to the best of his knowledge and belief.

Subscribed and sworn to before me this _____ day of _____, 1912.

My commission expires _____, 19—.

2.

STATE OF NORTH DAKOTA, }
County of _____, } ss:

_____, of the _____ of _____, County of _____, and State of North Dakota, being duly sworn deposes and says that he has read the statements contained in the foregoing application and affidavit of _____, and that they are true to the best of his knowledge and belief.

Subscribed and sworn to before me this _____ day of _____, 1912.

My commission expires _____, 19—.

(NOTE.—These affidavits may be made before a judge or clerk of any court, justice of the peace, or notary public.)

2. Such application and affidavits must be filed with the project engineer not later than August 1, 1912.

3. The barge will not be launched in 1912 until application in pursuance of the provisions of this order shall have been filed for at least 1500 acres or proper application and payment made for such area under the provisions of the public notices and orders heretofore issued.

SAMUEL ADAMS,
First Assistant Secretary.

RECLAMATION—WILLISTON PROJECT—EXTENSION OF TIME FOR PAYMENT.

ORDER.

DEPARTMENT OF THE INTERIOR,
Washington, June 25, 1912.

Whereas, in pursuance of the order of April 14, 1911, water was furnished in the season of 1911 to lands under the Williston project, North Dakota, constructed under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and

Whereas, the said order stated the terms and conditions under which and the charges for which water would be furnished during the seasons of 1911, 1912 and 1913, and

Whereas, a number of settlers or land owners are financially unable to pay the charges in said order announced for the seasons of 1911 and 1912, but are desirous of obtaining water for the season of 1912,

Therefore, it is hereby ordered that any such settler or land owner who in good faith has actually cultivated or improved his land and has alfalfa growing or seeded, or land cultivated and prepared for seeding, may obtain water for the season of 1912 upon the following conditions:

1. By filing with the project engineer application and affidavit on the form hereinafter set forth, which must be corroborated by two disinterested persons upon information and belief:

APPLICATION FOR EXTENSION OF TIME FOR PAYMENT OF 1911 OPERATION AND MAINTENANCE CHARGES.

I, _____, owner or entryman of _____, Sec. _____, T. _____ N., R. _____ W., containing _____ irrigable acres, do hereby apply for extension of time to December 1, 1912, for payment of the remainder of the charges for 1911, amounting to \$1.00 per acre for operation and maintenance and \$1.00 per acre-foot for all water delivered.

I have made the following progress in the cultivation of the soil: _____.

I have placed upon the land the following improvements: _____.

If this application is allowed, I hereby agree to pay, on or before December 1, 1912, as the balance of the increased charge, \$1.10 per acre (in lieu of \$1.00) for operation and maintenance for 1911, and \$1.10 per acre-foot for all water delivered in 1911; and, at the same time, an increased charge for 1912, aggregating \$1.55 per acre for operation and maintenance, and \$1.00 per acre-foot for all water delivered in 1912.

_____, *Applicant.*

AFFIDAVIT BY APPLICANT.

STATE OF NORTH DAKOTA, }
County of Williams. } ss:

_____, of the _____ of _____, county of _____, and State of North Dakota, being duly sworn, deposes and says that he is unable to make payment of the 1911 water charges at the present time, and that the statements contained in his application for extension of time for such payments are true.

Subscribed and sworn to before me, this _____ day of _____, 1912.

My commission expires _____, 19—.

CORROBORATION OF APPLICANT'S STATEMENTS BY TWO DISINTERESTED PERSONS.

1.

STATE OF NORTH DAKOTA, }
County of _____. } ss:

_____, of the _____ of _____, county of _____, and State of North Dakota, being duly sworn, deposes and says that he has read the statements contained in the foregoing application and affidavit of _____, and that they are true to the best of his knowledge and belief.

Subscribed and sworn to before me this _____ day of _____, 1912.

My commission expires _____, 19—.

2.

STATE OF NORTH DAKOTA, }
 County of ———, } ss:

———, of the ——— of ———, county of ———, and State of North Dakota, being duly sworn, deposes and says that he has read the statements contained in the foregoing application and affidavit of ——— ———, and that they are true to the best of his knowledge and belief.

Subscribed and sworn to before me this ——— day of ———, 1912.

My commission expires ———, 19—.

(NOTE.—These affidavits may be made before a judge or clerk of any court, justice of the peace, or notary public.)

2. Such application and affidavits must be filed with the project engineer not later than August 1, 1912.

3. The barge will not be launched in 1912 until application in pursuance of the provisions of this order shall have been filed for at least 3000 acres or proper application and payment made for such area under the provisions of the public notices and orders heretofore issued.

SAMUEL ADAMS,
First Assistant Secretary.

SANTA FE PACIFIC R. R. CO.

Decided June 26, 1912.

INDIAN LANDS—SCHOOL LANDS—EXCHANGE—ACT OF APRIL 21, 1904.

The filing of a selection under the act of April 21, 1904, authorizing the selection of public lands in exchange for lands in Indian reservations, constitutes an appropriation of the lands within the meaning of the act of June 20, 1910, making an additional grant of school lands to Arizona, and said latter act therefore furnishes no obstacle to the consummation of such selection pending at the date of its passage.

ADAMS, *First Assistant Secretary:*

December 23, 1911, you forwarded papers relating to proposed exchange of 32,864.64 acres of land in the Moqui Indian Reservation, Arizona, owned by the Santa Fe Pacific Railroad Company, for 32,841.22 acres of public land in the Phoenix, Arizona, land district, application 010762, act of April 21, 1904 (33 Stat., 211).

As required by the regulations the base and selected lands have been examined by an officer of the Department and found to be of equal value and of practically the same character, and the selected lands are reported as vacant, nonmineral, and nontimbered. You recommend the approval of the selection, subject to publication and posting of notice and of payments of certain costs and fees, but direct attention to the fact that 5,080 acres of the selected lands are

within sections 2 and 32, and that by act of Congress approved June 20, 1910, sections 2 and 32 in the Territory of Arizona were granted to the future State for the support of common schools.

The Department accorded the railroad company and the State an opportunity to be heard in the matter, and briefs and arguments have been submitted by each. It is contended for the State of Arizona, by its attorney-general, that prior to any right vesting in the railroad company by reason of its said application to select, the lands in question were granted by act of Congress approved June 20, 1910 (36 Stat., 572), to the State of Arizona, and that upon the admission of said State the title to the lands vested in it; that said sections 2 and 32 are no longer public lands of the United States, and the Secretary of the Interior is without authority to exchange same for lands surrendered by the railroad company under the act of April 21, 1904, *supra*. It is argued on behalf of the State that to accept the exchange tendered by the railroad company and issue patent to it, it would be necessary to divest the State of lands the title to which has been vested in it absolutely by the act of Congress.

On behalf of the railroad company it is contended that its selection was tendered and filed in the local land office prior to the date of the act reserving and granting said sections to the Territory of Arizona, and that by virtue of the language of said granting act same were excepted from the operation of the said grant.

The act of April 21, 1904, *supra*, provides that any private land over which an Indian reservation has been extended by Executive order—

may be exchanged at the discretion of the Secretary of the Interior and at the expense of the owner thereof, and under such rules and regulations as may be prescribed by the Secretary of the Interior, for vacant, nonmineral, nontimbered, surveyed public lands of equal area and value and situated in the same State or Territory.

Under the provisions of the said act the railroad company offered to exchange the area described within the limits of the Moqui Indian Reservation, Arizona, for public lands within the same State and filed its selection in due form in the local land office at Phoenix May 26, 1910. Subsequently, June 20, 1910, Congress passed the act above mentioned, making the grant to the State of Arizona for the support of common schools. Sections 16 and 36 had previously been reserved for the future State but the act of June 20, 1910, *supra*, added sections 2 and 32 to the grant in the following language:

That in addition to sections sixteen and thirty-six heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State *not otherwise appropriated* at the date of the passage of this act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof,

are mineral or have been sold, reserved, or otherwise appropriated or reserved by or under authority of any act of Congress or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry, has been made heretofore or hereafter and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes and acts amendatory thereof or supplementary thereto, are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein.

There is no question as to the power of Congress to make disposition of lands embraced in an application to select under a proffered exchange at any time prior to the actual approval of the exchange by the Secretary of the Interior. The whole question in this case is, however, did the enabling act grant to the new State lands embraced in pending applications for exchange? It will be noticed that the grant was only of lands "not otherwise appropriated at the date of the passage of this act," and indemnity was provided where any of the sections by number granted "are mineral or have been sold, reserved, or otherwise appropriated or reserved by or under authority of any act of Congress . . . or where settlement thereof with a view to preemption or homestead, or improvement thereof with a view to desert-land entry, has been made heretofore or hereafter and before the survey thereof in the field."

It must be apparent from a most casual reading of these provisions that Congress was seeking to protect all claims lawfully initiated under any law of Congress prior to the passage of the act making the grant. The grant was double that usually made to the several States on admission for common-school support and indemnity was provided for all of those lands lost in place. The State relies largely upon the language found in the case of *Sjoli v. Dreschel* (199 U. S., 564), but without giving extended consideration thereto, it is sufficient to say that said decision was explained and distinguished in the more recent case of *Weyerhaeuser v. Hoyt* (219 U. S., 380), and from the latter decision it may be fairly deduced that a selection requiring departmental approval is from the date of its filing an appropriation of the land selected and that when approval is given, its relation is of the time of its filing. It follows that as against all others than the United States the filing of the railroad selection constituted an appropriation of the lands within the meaning of the act of June 20, 1910, and said act furnishes no obstacle to the consummation of such selection pending at the date of its passage. See *Andrew J. Billan* (36 L. D., 334).

Accordingly, the protest of the State of Arizona against selection 010762 of the Santa Fe Pacific Railroad Company is hereby dismissed, and you are authorized, upon full compliance with all re-

quirements imposed by the law and regulations, to approve the selection in the absence of other and further objection. Your attention is directed to the fact that since the receipt of the record in the Department proof of publication and posting of notice of said selection has been filed.

HOMESTEAD—FILING OF ELECTION UNDER ACT OF JUNE 6, 1912.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 29, 1912.

REGISTER AND RECEIVER,
United States Land Offices.

SIRS: The last proviso to section 2291, R. S., as amended by the act of June 6, 1912 (Public, No. 179), provides that—

any such entryman may, by giving notice within 120 days after the passage of this act, by registered letter to the register and receiver of the local land office, elect to make proof upon his entry under the law under which the same was made without regard to the provisions of this act.

It appears from reports received that a number of entrymen have presented such elections personally at local offices, and that others have been received by ordinary mail.

While the act directs that elections be forwarded by registered letter, the fact that they reach you in other ways will not defeat the right of entrymen to have the benefits thereof. Accordingly, in whatever way received, you will, if the election is in proper form, note the filing thereof on the serial number register, and forward the same to this office.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:
SAMUEL ADAMS,
Acting Secretary.

RECLAMATION—OKANOGAN PROJECT—WATER RIGHTS.

ORDER.

DEPARTMENT OF THE INTERIOR,
Washington, July 6, 1912.

Whereas, in pursuance of the acts of Congress approved June 17, 1902 (32 Stat., 388), and February 13, 1911 (36 Stat., 902), an order was promulgated on April 29, 1912 (40 L. D., 616), for the Okanogan project, Washington, granting under the conditions therein set forth

a further stay of proceedings for the cancellation of entries and water-right applications: and

Whereas, the amendatory contract with the Okanogan Water Users' Association was executed June 22, 1912, to cover proposed improvements specified in said order and the time remaining as set forth in paragraph 6 of said order is not sufficient for the formal execution and recording of contracts for covenants running with the land to secure proper applications for water rights and it is necessary to extend the time for the execution and recording of said contracts, and

Whereas, it is deemed advisable to announce at this time the maximum building charge to be inserted in said contract;

Now, therefore, in pursuance of the said acts of Congress:

1. All entries and water-right applications hereafter made without valid written assignment of credits for payments theretofore made, shall be subject to a building charge of not to exceed \$110 per acre, pending the issuance of public notice providing therefor, and such entrymen and applicants may receive water upon payment of the rental charges provided for in order of April 29, 1912, or which may be hereafter announced.

2. Paragraph 6 of said order is hereby amended so that the time limit for the formal execution and recording of contracts containing covenants running with the land, to secure proper applications for water rights, shall be August 1, 1912, instead of July 1, 1912.

SAMUEL ADAMS,
First Assistant Secretary.

PARAGRAPH 19 OF COAL-LAND REGULATIONS AMENDED.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, July 9, 1912.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: That portion of paragraph 19, of the coal land regulations, approved April 12, 1907 (35 L. D., 665, 671-672), setting forth the forms for the notice, is hereby amended to read as follows:

Notice for publication.

COAL ENTRY.

(Sec. 2347, R. S.)

____ LAND OFFICE,
____, 19—

Notice is hereby given that _____, of _____, county of _____, State of _____, has this day filed in this office his application to purchase, under the

provisions of section 2347, U. S. Revised Statutes, the — of section No. —, township No. —, range No. —.

Any and all persons claiming adversely the lands described, or desiring to object for any reason to the entry thereof by the applicant, should file their affidavits of protest in this office during the thirty-day period of publication immediately following the first printed issue of this notice, otherwise the application may be allowed.

—, Register.

Notice for publication.

COAL ENTRY.

(Secs. 2348-52, R. S.)

— LAND OFFICE,
—, 19—.

Notice is hereby given that —, of —, county of —, State of —, who, on the — day of —, 19—, filed in this office his coal declaratory statement for the — of section No. —, township No. —, range No. —, has this day filed in this office his application to purchase said land under the provisions of sections 2348 to 2352, U. S. Revised Statutes.

Any and all persons claiming adversely the lands described, or desiring to object for any reason to the entry thereof by the applicant, should file their affidavits of protest in this office during the thirty-day period of publication immediately following the first printed issue of this notice.

—, Register.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

SAMUEL ADAMS, *Acting Secretary.*

RIGHT OF WAY—POWER SITES—APPLICATION BY CORPORATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, July 10, 1912.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: In order to comply with the requirements of the Director of the United States Geological Survey in the matter of applications for rights of way submitted to him for consideration and report with respect to the power possibilities of the land involved, I have to direct that modification of paragraphs *a* and *f*, section 8 of circular of June 6, 1908 [36 L. D., 567], be made as follows:

(a) A copy of its articles of incorporation, duly certified to by the proper officers of the company under its corporate seal, or by the secretary of the State or Territory where organized; also an uncertified copy of the articles of incorporation.

(f) A true list, in duplicate, signed by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs.

You will see that these changes are made in circulars hereafter distributed under this act.

Very respectfully,

SAMUEL ADAMS,
First Assistant Secretary.

RECLAMATION—FORT SHAW UNIT, SUN RIVER PROJECT—EXTENSION OF TIME.

ORDER.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., July 13, 1912.

Whereas, it has been reported to the Department that many of the water users under the Fort Shaw unit of the Sun River project, Montana, are unable to pay the operation and maintenance charge due March 1, 1912, amounting to \$1.00 per acre of irrigable land, and that the postponement for the liability for such charge until December 1, 1912, with an increase of 10 cents in the amount of such charge will enable the water users to obtain water and make a crop in the season of 1912.

Now, therefore, by virtue of the authority contained in the Reclamation Act approved June 17, 1902 (32 Stat., 388), and by acts supplementary thereto and amendatory thereof, it is hereby ordered:

1. That any water user in said project, who has filed water right application subject to the terms of the public notices heretofore issued, and who is financially unable to pay the portion for operation and maintenance of the installment due March 1, 1912, amounting to \$1.00 per acre of irrigable land, may receive water in the irrigation season of 1912, without prior payment thereof, subject to the following conditions:

2. Every such water user shall fully pay the unpaid balance, if any, of operation and maintenance charges for 1911 and prior years before any water is furnished for his land in 1912.

3. Every such water user desiring such extension of time shall on or before August 15, 1912, make written application therefor to the Project Engineer, accompanied by his affidavit that he is unable to make such payment at this time and agreeing to make the said payment not later than December 1, 1912. For all persons to whom such extension is granted, the charge for operation and maintenance for 1912 shall be \$1.10 instead of \$1.00 per acre of irrigable land.

SAMUEL ADAMS,
First Assistant Secretary.

THREE-YEAR HOMESTEAD—ACT JUNE 6, 1912.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
Washington, July 15, 1912.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Questions having arisen, through correspondence and otherwise, as to the construction to be given the several provisions of the new homestead law of June 6, 1912 (Public, No. 179), I have thought it advisable at this time to give the following general outline of my understanding of this act as affecting entries made prior to its passage, as well as those made thereafter; also to prescribe an order of procedure to be respected in matter of applications for reduction of the required area of cultivation and to promulgate a rule prescribing the amount of cultivation to be required respecting entries made prior to, but which are to be adjudicated under, the new law:

RESIDENCE.

(1) By the act of June 6, 1912 (Public, No. 179), the period of residence necessary to be shown in order to entitle a person to patent under the homestead laws is reduced from five to three years, and the period within which a homestead entry may be completed is reduced from seven to five years. The three-year period of residence, however, is fixed not from the date of the entry but "from the time of establishing actual permanent residence upon the land." It follows, as a consequence, that credit can not be given for constructive residence for the period that may elapse between the date of the entry and that of establishing actual permanent residence upon the land.

(2) Honorably discharged soldiers and sailors of the War of the Rebellion and also of the Spanish War and the suppression of the insurrection in the Philippines, entitled to claim credit under their homestead entries for the period of their military service, may do so after they have "resided upon, improved, and *cultivated* the land for a period of at least one year" after they shall have commenced their improvements. This is the requirement of section 2305 of the Revised Statutes, which is in nowise affected by the act of June 6, 1912. Respecting the cultivation to be required under said section it has been heretofore administered as requiring such showing as ordinarily applies in other cases preliminary to final proof, and as the new law exacts showing of cultivation of at least one-eighth of the area before final proof a showing should be exacted of a like amount for at least one year before final proof.

CULTIVATION.

(3) Prior to the passage of this act no specific amount of cultivation had been required respecting a homestead entry made under the general law; that is, an entry for 160 acres. With respect to every such entry section 2291 of the Revised Statutes had required proof of "cultivating *the same* for the term of *five years* immediately succeeding the time of filing affidavit." The words "the same" could refer only to the entry, and literally construed would require the cultivation of the entire tract entered for the term of five years. But a more liberal interpretation has properly obtained in the land department, and proof has been accepted upon a showing that the tract has been used in a husband-like manner, even though a smaller part of the entire entry had been actually cultivated than was in fact susceptible of cultivation. Furthermore, the long period of residence required (five years) has, in many instances, led to the acceptance of even a much smaller area of cultivation than husband-like methods and the character of the land would have reasonably justified. Under exceptional circumstances grazing land has been accepted as the equivalent of cultivation, where the lands were valuable only for grazing purposes. This can not be justified under any known definition of "cultivation," although some special legislation with reference to lands formerly within Indian reservations seems to require such a construction with respect to these particular lands. Under this special legislation lands formerly within certain Indian reservations have been first specifically classified as grazing lands, and then specifically opened to entry under the homestead law. It would be impossible to administer these special laws unless grazing is accepted as a compliance therewith, where it can be shown that the lands are in fact not capable of cultivation. The classification, however, was general, and where the general area was grazing in character it was so classified, even where it embraced local areas susceptible of cultivation. Where such lands are in fact physically and climatically susceptible of tillage, the cultivation provisions of the new homestead law must be applied. By that law it is required that the claimant "cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth beginning with the third year of the entry, and until final proof, except that in the case of entries under section 6 of the enlarged-homestead laws, double the area of cultivation herein provided shall be required, but the Secretary may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation."

(4) The enlarged homestead acts here referred to (35 Stat., 639; 36 Stat., 531), authorize entries of 320 acres of lands designated for

this purpose by the Secretary of the Interior, and require proof "that at least one-eighth of the area embraced in the entry was continuously cultivated to agricultural crops, other than native grasses, beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry." The residence provisions of the homestead law (and now of the new act) were applicable to these entries, with an exception relating to certain lands in the States of Utah and Idaho, with respect to which the requirement of residence is omitted, and in lieu thereof the entryman is required to cultivate twice the area required under the general provisions of the act. The enlarged homestead acts were intended to apply generally to lands suitable for cultivation only under dry-farming methods, and under these methods it is customary to summer fallow a portion of the land one year, planting it the following year. Under the new law such summer fallowing can not be accepted as the equivalent of cultivation, and this was equally true of the old laws, which required the land to be "cultivated to agricultural crops other than native grasses." The new law, however, does reduce the required area of cultivation to not less than one-sixteenth during the second year of the entry, and not less than one-eighth during the third year of the entry, and until final proof, except that in the case of entries under section 6 of the enlarged homestead laws, where residence is not required, one-eighth of the area of the entry must be cultivated during the second year, and one-quarter beginning with the third year of the entry, and until final proof. In other words, the effect of the new law, with respect to the enlarged homestead acts, except in instances where residence is not required, is generally to reduce by one-half the amount of cultivation to agricultural crops other than native grasses, which had previously been required.

CHARACTER OF CULTIVATION.

(5) In reducing the period of residence required in perfecting title to a tract of land entered under the homestead law from five to three years Congress has required that it be shown that an actual cultivation has been accomplished of at least certain specified portions of the land entered. This amount has been fixed at one-sixteenth, beginning with the second year of the entry, and one-eighth the following year, and until proof is offered. In view of the liberal reduction in the period of residence making it possible to secure title in three years, which would require a showing of but two years' cultivation of one-sixteenth of the area entered, and an additional one-sixteenth for but one year, a mere breaking of the soil will not meet the terms of the statute, but such breaking or stirring of the soil must

also be accompanied by planting or the sowing of seed and tillage for a crop other than native grasses.

(6) It should be noted that under the new law the period within which the cultivation should be made is reckoned *from the date of the entry*.

REDUCTION OF CULTIVATION.

(7) The Secretary of the Interior is authorized, upon a satisfactory showing therefor, to reduce the required area of cultivation. In the administration of this provision it is not believed that the physical or financial disabilities or misfortunes of the entryman should be the grounds of reduction, but the sole question should be as to whether, under the peculiar conditions governing the tract entered, the exaction of cultivation of this particular tract by any entryman to the amount required is reasonable. The actual special physical and climatic conditions of the land entered in each case must therefore determine whether the required amount of cultivation should be reduced. It is desirable that the entryman should, wherever practicable, know in advance what, if any, reduction can properly be made; and therefore, as a general regulation governing applications for reduction in area of cultivation, it is directed that all entrymen who desire a reduction shall file applications therefor during the first year of the entry and upon forms to be prepared and furnished by the Commissioner of the General Land Office and distributed through the land offices. Where a satisfactory showing is filed in support of an application for reduction, you will submit the same with your recommendation in the premises; otherwise the application will be by you rejected subject to the usual right of appeal. The final granting of any reduction in area of cultivation rests with the Secretary of the Interior, who may in appropriate cases defer action until final proof.

EXCEPTIONS.

(8) The requirements as to cultivation do not apply to entries made for lands within a reclamation project under the act of June 17, 1902 (32 Stat., 388), nor to entries made in State of Nebraska under the act of April 28, 1904 (33 Stat., 547), commonly known as the Kinkaid Act. In such instances the existing requirements as to cultivation made by the acts named continue in force.

ENTRIES NOT REQUIRING RESIDENCE.

(9) In all entries made under section 6 of the enlarged homestead acts (35 Stat., 639, and 36 Stat., 531), under which residence is not required, the entryman must cultivate at least one-eighth of the

land in the second year after date of the entry and one-fourth of it during each year thereafter until he makes proof, and the *existing period* of cultivation required under said acts is not reduced by the act of June 6, 1912.

PERMISSIBLE ABSENCES FROM THE HOMESTEAD.

(10) The law clearly requires that the homestead entryman shall establish an actual residence upon the land entered within six months after the date of entry. Where, owing to climatic reasons, sickness, or other unavoidable cause, residence can not be commenced within this period, the Commissioner of the General Land Office may, within his discretion, allow the settler such additional period, not exceeding in the aggregate 12 months, within which to establish his residence. It is not meant thereby that because, for the reasons stated, residence may not be commenced within the six-months' period, that the settler is authorized to delay the commencement of residence beyond the required period and after the cause no longer exists. It is not thought necessary to require an application in advance in order to entitle the settler to this additional privilege, but the full circumstances will be open to investigation and consideration upon contest.

(11) After the establishment of residence the entryman is permitted to be absent from the land for one continuous period of not more than five months in each year following, provided that upon absenting himself for such period he has filed in the local land office notice of the beginning of such intended absence. He must also file notice with the local land office upon his return to the land following such period of absence.

(12) In according such extended periods of absence the Congress has dealt liberally with the homestead entryman, and bona fide continuous residence during the remaining portions of the three-year period must be clearly shown.

(13) A second period of absence immediately following the first period, even though the two periods occur in different years, reckoned from the date of the establishment of actual residence, will not be recognized, as it was never contemplated that an absence was permissible in excess of six months in view of the specific provisions for contest provided for in section 2197 of the Revised Statutes. There should be at least some substantial period of actual continuous residence upon the land separating the periods of absence accorded under the statute. Only those protracted absences with respect to which notice has been given as required by the statute will be respected either in case of contest or on final proof. This law does not repeal or modify the acts of March 2, 1889 (25 Stat., 854), June 25, 1910 (36 Stat., 864), and April 30, 1912 (37 Stat., —).

COMMUTATION.

(14) The privilege of commutation after 14 months' actual residence, as heretofore required by law, is unaffected by this legislation, excepting that the person commuting must be at the time a citizen of the United States. It has heretofore been the practice to permit the making of commutation proof upon a homestead entry by one who had merely declared his intention to become a citizen of the United States and prior to his actual naturalization. This practice, however, is abrogated, and in instances where commutation proof is made after the passage of this act it should be exacted and shown that the claimant, if foreign born, has become fully naturalized. Commutation proof can not, however, be made on entries under the enlarged homestead laws, the reclamation act, or on entries made under any other homestead law which prohibits commutation.

DEATH OF THE HOMESTEAD ENTRYMAN.

(15) Where the person making homestead entry dies before the offer of final proof, those succeeding to the entry in the order prescribed under the homestead law, in order to complete such entry must show that the entryman had complied with the law in all respects to the date of his death, and that they have since complied with the law in all respects as would have been required of the entryman had he lived, excepting that they are relieved from any requirement of residence upon the land. It follows, as a consequence, that where the entryman had not complied with the law in all respects prior to his death the entry will be forfeited, and upon proof thereof such entry will be canceled. This will apply to all entries made under the new law and those made prior to the passage of this act, where the entryman fails to elect to make proof under the law under which his entry was made.

ELECTION BY ENTRYMEN UNDER ENTRIES MADE PRIOR TO THIS ACT.

(16) The provisions of section 2291 of the Revised Statutes, as amended, in respect to the homestead period, are made applicable to all unperfected entries upon which residence is required, as well as to those made after June 6, 1912, where the entryman fails to elect to make proof under the law under which his entry was made within the prescribed time. This obligates the previous entryman to compliance with the law of June 6, 1912, respecting all of its provisions, the performance of which is exacted during the homestead period. As a consequence, while residence is reduced from five to three years, specific cultivation is exacted beginning with the second year after entry. Final proof of full compliance must be made within five years from date of entry.

RULE PRESCRIBED RESPECTING CULTIVATION TO BE SHOWN ON ENTRIES
MADE PRIOR TO, BUT ADJUDICATED UNDER, NEW LAW.

(17) It may be that such prior entryman can not show that he had cultivated one-sixteenth of the area embraced in his entry beginning with the second year of the entry and one-eighth beginning with the third year of the entry and until final proof, although he may have had during the year preceding his offer of proof one-eighth or more of the area embraced in his entry under actual cultivation, and may have cultivated one-sixteenth during the previous year, thus accomplishing the amount of cultivation required as a general rule under the new law, but not in the order and for the particular years required by that law.

(18) By the section I am authorized, under rules and regulations to be prescribed by me, to reduce the required area of cultivation. Acting thereunder, I have prescribed the following rule to govern action on proof where the homestead entry was made prior to June 6, 1912, but, through failure of election, must be adjudicated under the new law:

Respecting cultivation necessary to be shown upon such an entry, in all cases where, upon considering the whole record, the good faith of the entryman appears, the proof will be acceptable if it shows cultivation of at least one-sixteenth for one year and of at least one-eighth for the next year and each succeeding year until final proof, without regard to the particular year of the homestead period in which the cultivation of the one-sixteenth was performed.

TIME FOR PROOF ON ENTRIES MADE BEFORE BUT ADJUDICATED UNDER NEW
LAW.

(19) The new law also requires that the proof shall be made within five years from date of entry and if the entry is to be administered under that law the department is not authorized to extend the period within which proof may be made, but when submitted after that time, in the absence of adverse claims, the entry may be submitted to the board of equitable adjudication for confirmation.

(20) Respecting entries heretofore or hereafter made requiring payment for the land entered in annual installments extending beyond the period of residence required under the new law, the homesteader may make his proof as in other cases, but final certificate will not be issued until the entire purchase price has been paid.

(21) It may not be to the advantage of all entrymen to have their entries adjudicated under the new law, and the matter should be seriously considered before acting upon the election accorded previous entrymen under the statute.

(22) Unless they elect to make proof under the law under which their entries were made within the time accorded under the statute—

i. e., on or before October 4, 1912—it will be incumbent upon the department to exact compliance with the new law, subject to the regulation herein above established.

The local officers will be furnished with copies hereof for their use when inquiries are made of them respecting the new law.

Very respectfully,

WALTER L. FISHER,
Secretary.

[PUBLIC—No. 179.]

AN ACT To amend section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven of the Revised Statutes of the United States relating to homesteads.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven of the Revised Statutes of the United States be amended to read as follows:

“SEC. 2291. No certificate, however, shall be given or patent issued therefor until the expiration of three years from the date of such entry: and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry her heirs or devisee, in case of her death, proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States, then in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law: *Provided*, That upon filing in the local land office notice of the beginning of such absence, the entryman shall be entitled to a continuous leave of absence from the land for a period not exceeding five months in each year after establishing residence, and upon the termination of such absence the entryman shall file a notice of such termination in the local land office, but in case of commutation the fourteen months' actual residence as now required by law must be shown, and the person commuting must be at the time a citizen of the United States: *Provided*, That when the person making entry dies before the offer of final proof those succeeding to the entry must show that the entryman had complied with the law in all respects to the date of his death and that they have since complied with the law in all respects, as would have been required of the entryman had he lived, excepting that they are relieved from any requirement of residence upon the land: *Provided further*, That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry, and until final proof, except that in the case of entries under section six of the enlarged-homestead law double the area of cultivation herein provided shall be required, but the Secretary of the Interior may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation: *Provided*, That the above provision as to cultivation shall not apply to entries under the act of April twenty-eighth, nineteen hundred and four, commonly known as the Kinkaid Act, or entries under the act of June seventeenth, nineteen hundred and two, commonly known as the reclamation act, and that the provisions of this

section relative to the homestead period shall apply to all unperfected entries as well as entries hereafter made upon which residence is required: *Provided*, That the Secretary of the Interior shall, within sixty days after the passage of this act, send a copy of the same to each homestead entryman of record who may be affected thereby, by ordinary mail to his last known address, and any such entryman may, by giving notice within one hundred and twenty days after the passage of this act, by registered letter to the register and receiver of the local land office, elect to make proof upon his entry under the law under which the same was made without regard to the provisions of this act."

"SEC. 2297. If, at any time after the filing of the affidavit as required in section twenty-two hundred and ninety and before the expiration of the three years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time; then and in that event the land so entered shall revert to the Government: *Provided*, That the three years' period of residence herein fixed shall date from the time of establishing actual permanent residence upon the land: *And provided further*, That where there may be climatic reasons, sickness, or other unavoidable cause, the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe."

Approved, June 6, 1912.

WILLIAM E. BORAH.

THREE-YEAR HOMESTEAD—ACT JUNE 6, 1912—FAILURE TO ELECT.

The failure of a homestead entryman who made entry prior to the act of June 6, 1912, to elect to make proof under the law under which his entry was made, where notice was mailed to him in accordance with the act, subjects his entry to adjudication under said act, regardless of the reason that influenced him or caused his failure to elect to have his entry adjudicated under the old law.

CULTIVATION UNDER THREE-YEAR HOMESTEAD ACT IN CASE OF FAILURE TO ELECT.

Respecting the cultivation necessary to be shown upon homestead entries made prior to the act of June 6, 1912, where, through failure to elect, the entries must be adjudicated under said act, in all cases where upon considering the whole record the good faith of the entryman appears, the proof will be acceptable if it shows cultivation of at least one sixteenth of the area of the entry for one year and at least one eighth for the next year and each succeeding year until final proof, without regard to the particular year of the homestead period in which the cultivation of the one sixteenth was performed.

*Secretary Fisher to Hon. William E. Borah, United States Senate,
July 15, 1912.*

I have your letter of the 8th instant in which you ask my consideration of two propositions involving construction of the three-year homestead act of June 6, 1912 (Public, No. 179).

You first raise the question as to the consequence which will follow the failure of an entryman who had made homestead entry prior to June 6, 1912, to elect to make proof under the law under which his

entry was made, due to the fact of failure to receive the notice mailed to him by the Department, or for other reasons, and with respect thereto you put the question whether he might not proceed to prove up under the old law if he should have complied with the terms of that law at the time of offering proof.

Respecting this matter, you say :

I will be glad to see a ruling or regulation adopted by the Department upon this, and it seems to me that, both as a matter of law and as a matter of right, the failure to give notice of election would not in any wise jeopardize the rights of the old parties under the law. If this is the view of the Department, and it can be so held at this time, it will allay a great deal of fear which has arisen by reason of this provision.

The provision of law referred to reads as follows :

Provided, That the Secretary of the Interior shall, within sixty days after the passage of this act, send a copy of the same to each homestead entryman of record who may be affected thereby, by ordinary mail to his last known address, and any such entryman may, by giving notice within one hundred and twenty days after the passage of this act, by registered letter to the register and receiver of the local land office, elect to make proof upon his entry under the law under which the same was made without regard to the provisions of this act.

At the time this legislation was under consideration, in answer to request from both Houses of Congress and later during the conferences on the bill, I expressed the opinion that legislation along the lines proposed in my last annual report would be more advantageous to the general homeseeker, and that in any event the provisions of the new law should not be made applicable to existing entries, except upon the election of the homesteader. The bill was modified to meet certain of my suggestions, in some of which you concurred, but it was apparently thought by those entrusted with the framing of the legislation that the advantages bestowed upon the homesteader under the new law were such that it would be greatly to the interest of all entrymen to accept its provisions. Because thereof the Department was directed to send a copy of the act, by ordinary mail, to each homesteader, at his last known address, and it was explicitly provided that a limited privilege should be accorded to a previous entryman to elect to have entry taken out of the operation of the new law.

It seems to be plain under this legislation that the failure of the entryman to elect, where the notice was mailed as directed, subjects his entry to adjudication under the new law without respect to the reason that influenced him or caused his failure to elect to have his entry adjudicated under the old law.

I think, however, the provision of the new law which vests the Secretary of the Interior with the power, "upon a satisfactory showing under rules and regulations prescribed by him, to reduce the required area of cultivation" will permit the Department to prevent

any undue hardship and to bring about a substantially uniform administration of the two statutes. The new law, in reducing the period of residence required, has at the same time attempted to establish certain safeguards to ensure bona fide and progressive cultivation. The requirement is "that the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry, and until final proof." The old law required with respect to each entry proof of "cultivating *the same* for the term of five years immediately succeeding the time of filing the affidavit." The words "the same" can refer only to "the entry," and if strictly construed would require the cultivation of the entire tract entered for the entire period of the five years. Such a construction, however, would have been, in my judgment, unreasonable, and the language of the act has very properly been liberalized in its construction by the General Land Office—by holding that the cultivation intended to be required was only such cultivation as husbandlike methods and the circumstances of the case reasonably justified and permitted. It would have been a liberal construction of the old law to have established the general rule for which the new law provides—that of requiring the cultivation of at least one-sixteenth of the area during the second year after entry, and of at least one-eighth during the third year after entry. The authority to require more than this amount, where the circumstances clearly justified such a requirement as evidence of good faith and bona fide homesteading, and upon the other hand the authority to accept a lesser area of cultivation, under general rules and regulations, enables the Department to protect public interests and at the same time secure the flexibility essential to wise administration. I believe that an even larger area could wisely have been required as a general rule, provided a reduction could have been permitted wherever the circumstances justified.

It is true that if an entryman under the old law is to be governed by the provisions of the new law he would be required to make proof that he has cultivated one-sixteenth of his entry during the second year and one-eighth during the third year and each succeeding year, unless a reduction is authorized by general rules and regulations prescribed by the Secretary of the Interior. I believe, however, that in adjusting the new law to the existing conditions, it is entirely proper for the Secretary of the Interior to prescribe rules and regulations under which the substance of the new requirements will be obtained, without insisting upon literal compliance with those requirements as to the precise years of the homestead period during which the cultivation was made. In other words, I can by regulation reduce the

amount of cultivation for the second or third or any other year or years, requiring no specific cultivation therein, where the proof shows good faith and that the required cultivation has in fact been performed, although not in the second and third years of the homestead period. Entries made under the new law should, as a general rule, be held to a bona fide compliance with its requirements, both as to the amount and the time of cultivation; but in view of the impracticability of applying the time requirements to entries made under the old law, I believe it is proper to establish a rule and regulation that will secure the essential feature of substantial cultivation. This would be secured where the old entryman has cultivated one-sixteenth of his entry during one year and one-eighth of his entry during the next and succeeding years, even though the one-sixteenth was not cultivated during the second year after his entry was made. I do not feel warranted in passing an entry to patent upon one year's cultivation. Therefore, the mere fact that a showing is made of cultivation of one-eighth of the land at the time of proof will not in itself be sufficient. I have accordingly prescribed the following rule to govern action on proof when the homestead entry was made prior to June 6, 1912, but, through failure of election, must be adjudicated under the new law:

Respecting cultivation necessary to be shown upon such an entry, in all cases where upon considering the whole record the good faith of the entryman appears, the proof will be acceptable if it shows cultivation of at least one-sixteenth for one year and of at least one-eighth for the next year and each succeeding year until final proof, without regard to the particular year of the homestead period in which the cultivation of the one-sixteenth was performed.

I enclose for your information a copy of a letter of instruction this day addressed to the Commissioner of the General Land Office containing certain general observations upon the new law. I believe it will be possible to find proper methods of protecting all meritorious cases. If your attention is directed to any instances in which this is not being accomplished I will be greatly obliged if you will advise me.

RECLAMATION—SHOSHONE PROJECT—WATER SERVICE.

ORDER.

DEPARTMENT OF THE INTERIOR,
Washington, July 17, 1912.

The order of February 6, 1911 [39 L. D., 537], for the Shoshone Project, Wyoming, regarding the amount of water to be delivered, is hereby modified by the addition of a proviso to paragraph 4 so that the order shall read as follows:

1. The instructions accompanying the public notices heretofore issued opening to irrigation lands in the Shoshone project, Wyoming, in pursuance of the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), provide that the amount of water to be furnished to be stated in the second paragraph of each water-right application is three acre-feet per acre per annum.

2. In accordance with such instructions the water-right application as executed by the water users reads as follows:

The amount of water to be furnished hereunder shall be three acre-feet of water per annum per acre of irrigable land as aforesaid measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project; provided that the supply furnished shall be limited to the amount of water beneficially used on said irrigable land.

3. Experience has demonstrated that the quantity of water stated is in excess of the actual needs for beneficial use and that the application of the said quantity of water is having a detrimental effect upon the irrigated lands.

4. It is accordingly hereby ordered that the amount of water to be furnished hereafter shall not exceed two acre-feet of water per annum per acre of irrigable land, measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project: *Provided*, That the supply furnished shall be limited to the amount of water beneficially used on said irrigable land: *Provided further*, That additional water may be furnished in quantities not less than a quarter acre-foot per acre for the land for which the water is to be delivered at the rate of eighty cents per acre-foot, upon payment for such amount at the time of ordering the same.

SAMUEL ADAMS,
First Assistant Secretary.

RECLAMATION HOMESTEADS—CONTEST—ACT APRIL 30, 1912.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, July 25, 1912.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Your attention is directed to the provisions of the act of Congress approved April 30, 1912 (Public, No. 142), reading as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no qualified entryman who prior

to June twenty-fifth, nineteen hundred and ten, made bona fide entry upon lands proposed to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two, the national reclamation law, and who established residence in good faith upon the lands entered by him, shall be subject to contest for failure to maintain residence or make improvements upon his land prior to the time when water is available for the irrigation of the lands embraced in his entry, but all such entrymen shall, within ninety days after the issuance of the public notice required by section four of the reclamation act, fixing the date when water will be available for irrigation, file in the local land office a water-right application for the irrigable lands embraced in his entry, in conformity with the public notice and approved farm unit plat for the township in which his entry lies, and shall also file an affidavit that he has reestablished his residence on the land with the intention of maintaining the same for a period sufficient to enable him to make final proof: *Provided*, That no such entryman shall be entitled to have counted as part of the required period of residence any period of time during which he was not actually upon the said land prior to the date of the notice aforesaid, and no application for the entry of said lands shall be received until after the expiration of the ninety days after the issuance of notice within which the entryman is hereby required to reestablish his residence and apply for water right.

You are directed to familiarize yourselves with this law and be governed by its provisions.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

LOCATION OF SOLDIERS' ADDITIONAL RIGHTS IN ALASKA.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 31, 1912.

UNITED STATES SURVEYOR-GENERAL,

AND

REGISTERS AND RECEIVERS,

*United States Land Offices,
District of Alaska.*

GENTLEMEN: Any person hereafter seeking to acquire title to unsurveyed lands in the District of Alaska by the location of rights under sections 2306 and 2307, Revised Statutes (soldiers' additional), under the act of May 14, 1898 (30 Stat., 409), as amended by the act of March 3, 1903 (32 Stat., 1028), and the instructions and regula-

tions of the Department issued thereunder, must file with the register and receiver of the proper local office an application, in duplicate, to enter the tract, describing it by approximate latitude and longitude, and otherwise identifying it with as much certainty as may be without an actual survey, and accompany such application by evidence of his ownership of the additional right. The register and receiver will, upon receipt of such application, note its filing, designate the original by the current serial number, transmit it, together with the proof of ownership of the right, to this office, forward the copy to the Chief of Field Division, and furnish the applicant a statement thereof, which upon presentation to any deputy surveyor, shall constitute his authority for executing a survey of the tract.

The survey must be made at the expense of the applicant and no right will be recognized as initiated by such application unless actual work on the survey is begun within ninety days from the date the application is filed and completed without delay. The deputy surveyor shall certify to the field notes and plat, which must be filed with the Surveyor General, together with all proofs required by the laws and regulations. The Surveyor General will examine the plat, field notes and proofs to ascertain whether the regulations have been complied with, and if he finds the work regular, he will forward the papers to this office for approval.

On approval of the survey by this office the Surveyor General will be advised thereof and directed to file a certified copy of the plat and field notes with the register and receiver, who will notify the applicant to furnish the proofs and proceed within sixty days with the posting and publication under the instructions heretofore issued (32 L. D., 439, 441), and that in the event of his failure to take action, the application will be rejected and the survey canceled. The register and receiver will at once mail a copy of the notice for publication to the Chief of Field Division.

The application shall be subject to contest for any cause affecting its validity, or for failure by the applicant to comply with these regulations.

All rights under existing surveys shall cease and terminate if the parties in interest shall fail within six months after date hereof to file with the register and receiver appropriate applications to enter, accompanied by proofs of ownership of rights sought to be located on the several tracts.

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

OBRITSCHKEWIT v. LONG.

Decided May 3, 1912.

LEAVE OF ABSENCE—ACT OF JANUARY 28, 1910—CONTEST.

Section 2 of the act of January 28, 1910, granting leave of absence to homestead entrymen in certain States for a period of three months from the passage of the act, has no application to an entryman who failed to establish residence within the time fixed by law and was in default long prior to the date of said act, and such section will not protect the entryman in such case from a charge of abandonment during such period.

THOMPSON, *Assistant Secretary*:

Guy W. Long appeals from a decision of the General Land Office, holding for cancellation his homestead entry, made May 11, 1907, for the SW. $\frac{1}{4}$, Sec. 10, T. 136 N., R. 100 W., Dickinson, North Dakota, upon the contest of Nick Obritschkewit, charging that:

Guy W. Long has not resided upon and cultivated said land as is by law required. That he has abandoned the same and has been continuously absent therefrom for a period of more than six months immediately prior to the commencement of this action. That default now exists.

Upon the testimony taken at the hearing, the local officers found that claimant never in good faith established his residence upon the land prior to service of notice of contest, and recommended that entry be canceled. The General Land Office affirmed their decision and held the entry for cancellation.

Claimant appeared at the time and place of hearing and moved to dismiss the contest for the reason that it charged abandonment for six months immediately prior to contest which covered, in part, a period for which he was granted leave of absence by the act of January 28, 1910 (36 Stat., 189).

The motion was overruled and contestant submitted testimony. Claimant, although present at the trial, refused to testify but rested his defense solely upon the sufficiency of his motion to dismiss the proceeding for insufficiency of the charge.

The charge was general, that he had not resided upon and cultivated the land, as required by law. That was sufficient upon which to order a hearing. The testimony submitted in support of such charge shows that claimant never established a residence upon the land, which, if not true, demanded from him a denial. His silence and refusal to testify, in the face of such proof, may be justly construed against him as a tacit admission of the truth of the charge.

The additional charge that he abandoned the land and had been continuously absent from it for more than six months immediately prior to the contest was immaterial as the first charge had been proven. But the charge of abandonment for six months immediately prior to the contest was clearly proven, as this claimant was not protected from proceedings under such charge by the act of January 28, 1910. That act extended to May 15, 1910, the time in which homesteaders in certain named States were required to establish

residence where the time in which to establish such residence "expired or expires after December 1, 1909." The second section of said act grants leave of absence to homestead entrymen in said State for a period of three months from the passage of the act. The time in which claimant was required to establish residence under his entry had expired more than two years before the passage of the act and he was not protected by its provisions. The second section of the act has no application to an entryman who had not established residence within the required time and who was in default long prior to the date of said act.

The decision of the General Land Office is affirmed.

OBRITSCHKEWIT v. LONG.

Motion for rehearing of departmental decision of May 3, 1912, 41 L. D., 118, denied by Assistant Secretary Laylin, August 5, 1912.

HON v. MARTINAS.

Decided May 25, 1912.

HOMESTEAD—RESIDENCE AND CULTIVATION.

The homestead law contemplates a continuous compliance both as to residence and cultivation, beginning with the date of entry.

DEATH OF ENTRYMAN—CULTIVATION AND IMPROVEMENT.

Upon the death of an entryman those upon whom the statute casts the right to perfect title under the entry are merely required to continue cultivation and improvement of the land, so that failure to cultivate in any given year subjects the entry to contest and possible cancellation.

CULTIVATION BY WIDOW OR HEIRS—CONTEST.

In this case the entryman died seven months after entry without residence upon or cultivation of the land entered. After more than a year had elapsed following the death of the entryman the widow caused ten acres to be cleared and harrowed. On contest, it is held that this showing does not meet the requirements of the homestead law and cancellation is ordered.

CONFLICTING DECISIONS OVERRULED.

Heirs of Stevenson v. Cunningham, 32 L. D., 650; McCraney v. Heirs of Hayes, 33 L. D., 21; Meeboer v. Heirs of Schut, 35 L. D., 335; and Wilson v. Heirs of Smith, 37 L. D., 519, overruled, in so far as in conflict.

ADAMS, *First Assistant Secretary*:

Robert L. Hon has appealed from the decision of August 6, 1910, by the Commissioner of the General Land Office, dismissing his contest and holding intact the entry of Charles W. Martinas, made December 5, 1907, for the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and lot 4, Sec. 30, lot 1, Sec. 29, and lots 3 and 4, Sec. 32, T. 5 S., R. 4 E., B. M., Boise land district, Idaho.

The facts of this case are as follows:

On December 5, 1907, entry was made. About seven months later, that is, on July 2, 1908, entryman died, without ever having estab-

lished any residence or performed any cultivation upon the land entered. During the five remaining months of 1908 and the subsequent ten months of 1909 no residence was established and no cultivation was done by the widow or the heirs or by anyone in her or their behalf. On November 8, 1909, very nearly two years after the date of entry, about 10 acres of the land were cleared and harrowed by parties claiming to act as the agent of entryman's widow.

In the decision of the register and receiver of May 10, 1910, holding this entry for cancellation (which decision was subsequently reversed by the decision of the Commissioner of the General Land Office August 6, 1910), the facts were considered and argument made thereon for the sole purpose of deciding whether or not the widow had complied with the law as to residence and cultivation prior to the initiation of the contest by Hon. They found that she had not. They insist, and rightly, that the law as to cultivation requires a "continuity of cultivation," and admitting defendant's own contention that the appropriate time for preparing this land for a crop is late in the fall (thus justifying the clearing and harrowing done in November, 1909, above referred to), they assert that compliance with the law would require that the defendant should begin to prepare the land for cultivation in the fall of 1908, as being the cropping season next after entryman's death, and that a delay of more than one year and four months was such a failure to proceed with the cultivation and improvement of the land "within a reasonable time" after entryman's death as to warrant cancellation.

In the decision of the Commissioner of the General Land Office appealed from, which reversed the aforesaid action of the register and receiver, it is argued that the widow was not required to cultivate or improve the land in the summer or fall of 1908, entryman having died in July of that year, and that inasmuch as the preparation of the land for cultivation by clearing and harrowing 10 acres was begun in the fall of 1909, the appropriate time of the year for that locality and climate, she had complied with the requirements of the law. Upon the strength of this argument the register and receiver were reversed and the contest was dismissed.

Quite apart from the fact that this decision of the Commissioner clearly allows a break of an entire season in the "continuity of cultivation" of the land, since it allows the whole calendar year of 1908 to pass during the life of the entry without any residence or cultivation whatever, and quite apart from any consideration of the testimony introduced going to show that the alleged preparation of the land for cultivation was only colorable and a pretense, not being such as could reasonably have been expected to lead to a crop, there is a certain aspect of the case not adverted to by either the register and receiver or the Commissioner of the General Land Office, which is, nevertheless, decisive.

Section 2291 of the Revised Statutes, which states the requirements of the law under which the heirs of a deceased entryman may obtain patent to land entered by him, specifies that it must be proven that the entryman or his widow or his heirs have resided upon or cultivated the land "for the term of five years immediately succeeding the time of filing the affidavit." In the case under consideration the affidavit of entry was filed December 5, 1907, but absolutely no residence or cultivation whatever was even initiated for nearly two years thereafter, namely, until November 8, 1909. No device of argument as to whether the fall or the spring was the appropriate cropping season can avoid the fact that this plain requirement of the statute had not been complied with when the contest was begun, and furthermore, by no possible means could it be complied with thereafter as respects this entry, since at least one entire calendar year, that of 1908, out of the statutory term of five years "immediately succeeding the filing of the entry" had already passed without either residence or cultivation by the entryman or his widow or his heirs.

In some cases heretofore decided, notably the *Heirs of Stevenson v. Cunningham* (32 L. D., 650), and later cases based thereon, the Department, in its desire to do what it believed to be justice to the widows or heirs of deceased entrymen, has been led into a somewhat liberal interpretation of the letter of the statute above quoted in order to meet extenuating circumstances in the cases under consideration. Here, however, the matter is entirely without complication. At the time this contest came on for hearing the plain requirements of the law had not been complied with, and compliance therewith was no longer possible.

The decision appealed from is therefore reversed and the entry will be canceled.

The cases of *Heirs of Stevenson v. Cunningham* (32 L. D., 650), *McCraney v. Heirs of Hayes* (33 L. D., 21), *Meeboer v. Heirs of Schut* (35 L. D., 335), and *Wilson v. Heirs of Smith* (37 L. D., 519), in so far as they are in conflict with this decision, are hereby overruled.

[See *Makemson v. Snider's Heirs*, 22 L. D., 511, and *Schooley v. Heirs of Varnum*, 33 L. D., 45.]

BEERY v. NORTHERN PACIFIC RY. CO. ET AL.

Decided May 28, 1912.

CONTESTANT—PREFERENCE RIGHT—PERSONAL TO CONTESTANT.

The act of May 14, 1880, contemplates that entry by a successful contestant in exercise of the preference right accorded by that act shall be made by contestant in his own name and for his own benefit; and where a contestant procures the Northern Pacific Railway Company, within the preference right period, to make selection of the land under the act of July 1, 1898, for his benefit, in attempted exercise of his preference right, such selection is not a valid exercise of the right accorded by the act of 1880 and will not defeat a prior adverse application to enter the land.

ADAMS, *First Assistant Secretary*:

The Northern Pacific Railway Company and Edward B. Moon, under it, have appealed from a decision of the Commissioner of the General Land Office, dated May 20, 1911, holding for cancellation the company's selection of the SE. $\frac{1}{4}$, Sec. 20, T. 26 S., R. 31 E., W. M., Burns, Oregon, land district.

April 27, 1907, homestead entry was made for the above-described land by Emil D. Dahne, and as the result of a contest filed thereagainst June 17, 1909, by Edward B. Moon, the entry was canceled August 4, 1910, with instructions by the Commissioner of the General Land Office to notify Moon of his preference right to enter the land. Notice thereof was given to Moon's attorney but not to Moon personally, and on September 10, 1910, the Northern Pacific Railway Company filed its selection therefor under the provisions of the act of July 1, 1898 (30 Stat., 597), as extended by the act of May 17, 1906 (34 Stat., 197). This filing is alleged to have been made on behalf of Moon and in the exercise of his preference right. On August 17, 1910, during the preference right period and before the attempted exercise thereof Laura A. Beery applied to enter the land under the desert-land laws, her application being suspended by the local land officers to await the expiration of Moon's preference right period.

September 10, 1910, the local office rejected Beery's application because of said selection by the Northern Pacific Railway Company, but on the appeal of Beery, the Commissioner of the General Land Office, May 20, 1911, reversed the action of the local officers and directed that Beery's application be allowed.

Section 2 of the act of May 14, 1880 (21 Stat., 140), provides that:

In all cases where any person has contested, paid the land office fees, and procured the cancellation of any preemption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands.

The act of July 1, 1898, *supra*, was passed for the purpose of adjusting pending controversies between the railway company and adverse claimants to the lands within its grant existing on January 1, 1898. It provided that the company should, in return for the surrender of its claim to such lands within its grant, be accorded the right to select—

an equal quantity of public land, surveyed or unsurveyed, not mineral or reserved, not valuable for stone, iron, coal, and free from valid adverse claim, or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, and patent shall issue for the land so selected as though it had been originally granted.

It is clear from the language of the act of May 14, 1880, *supra*, and this Department has consistently held, that the preference right

secured by the successful contestant is not assignable or transferable, but must be exercised personally within the time prescribed in the statute. It was designed to secure the aid of individuals in ascertaining the existence of and clearing the records from, invalid entries or those upon which the entrymen were failing to comply with the requirements of the laws under which initiated. To encourage this assistance and expenditure by individuals, the act accorded them the preference right of entry in the event of the cancellation of the contested claim. It was not intended that the benefits derived from such an operation should be shared, either in whole or in part, by others, and evidently contemplated and intended that the entry made by the successful contestant should be for his exclusive benefit. To attain this end it is necessary that the entry should be made in his name and that patent should issue thereupon to him. The law did not provide either expressly or by implication that this preference right could be exercised either directly or indirectly by another, even though the third person had obligated himself after obtaining patent for the land to convey the title thereto, in whole or in part, to the successful contestant. The statute contemplated a personal proceeding and a personal reward.

The act of July 1, 1898, *supra*, extended a lieu or indemnity right to the railway company upon condition that it surrender its title to certain tracts within the limits of its original grant. The lieu selections are required to be made in the name of the company and to be patented to it as though the land "had been originally granted." In other words, the selections stand upon the records of the land department and the patents issue in the name of the railway company. While the lands so selected and patented may be transferred by the railway company, the law in question does not recognize the right of selection as an assignable one. The latter is made for the benefit, primarily at least, of the railway company and in partial satisfaction of its grant. To treat, therefore, the selection in the case at bar as the exercise of the preference right of contestant Moon, is to accord the benefit of the act of 1880, and of Moon's efforts in the contest, in whole or in part, to the railway company, an end not contemplated or authorized by said act of 1880. The selection must be regarded and treated as one made by the company and for its benefit, and not as an entry by contestant Moon. Treated as such, it is subsequent and inferior to the claim of Beery asserted to the land under the desert-land laws prior to the filing of the selection, which desert-land filing was received subject to, and which could only be defeated by, the exercise of his preference right to enter by contestant Moon. The act of 1880 does not prescribe the kind of entry which a successful contestant may make in the exercise of his preference right, but it clearly contemplates and requires that

it shall be his filing and for his benefit, and not that third parties shall reap, either in whole or in part, the fruits of the privilege extended by the law to the contestant personally.

The decision of the Commissioner of the General Land Office is accordingly affirmed, and the railway company's selection canceled.

It is noted that the filing by the Northern Pacific Railway Company, alleged to have been made in the exercise of Moon's preference right, was not made within thirty days from date of notice of cancellation to Moon's attorney, but in view of the conclusion above reached, it is unnecessary to further consider this phase of the case.

BEERY v. NORTHERN PACIFIC RY. CO.

Motion for rehearing of departmental decision of May 28, 1912, 41 L. D., 121, denied by First Assistant Secretary Adams, August 27, 1912.

TRACY v. JOHNSON.

Decided May 29, 1912.

PRACTICE—NOTICE—SERVICE BY REGISTERED LETTER.

Where notice of a contest is sent by registered mail, proof of delivery of the registered letter containing the notice to the agent of the addressee, authorized by him, in writing, to receive it, is a compliance with the requirement of Rule 7 of the Rules of Practice that service of notice in such case must be evidenced by the post-office registry return receipt, "showing personal delivery to the party to whom the same is directed."

THOMPSON, *Assistant Secretary*:

Homestead entry was made March 25, 1911, by Millard F. Johnson for the S. $\frac{1}{2}$, S. $\frac{1}{2}$ N. $\frac{1}{2}$, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 26, T. 16 N., R. 57 W., North Platte, Nebraska, land district.

Tracy filed contest affidavit June 2, 1911, charging that at the date of entry the claimant was not qualified to make the same for the reason that he owned more than one hundred and sixty acres of land and that the entry was made for the fraudulent purpose of speculating with and selling his relinquishment and not in good faith to secure a home for himself.

Notice of contest issued June 14, 1911, and it is shown that a copy thereof was sent to the defendant June 24, 1911, by registered mail, to his address of record, Schuyler, Nebraska. On August 5, 1911, the local officers reported to the General Land Office that "claimant is in default for plea or answer" and recommended the cancellation of the entry.

On August 14, 1911, Johnson filed in the local office his affidavit, in which he states that his residence and post-office address are Schuyler, Nebraska; that in the month of May, 1911, he left Schuyler and was absent until August 13, 1911. He further states that—

during the month of June, 1911, registered letter, containing notice of contest in this contest was received by the Schuyler post-office, and that immediately

thereafter Mrs. Anna Gardner of said city sent an order to claimant at Bentonville, Arkansas, on the Postmaster at Schuyler for said letter; that said order was received by claimant and duly signed and returned to said Mrs. Gardner, who receipted for and received the said letter; that said Mrs. Gardner thereupon inclosed said letter containing said notice, and forwarded same by ordinary mail to claimant at Bentonville, Arkansas; that claimant was absent from Bentonville, traveling at different places and did not receive his mail therefrom nor return thereto until said August 10th.

There is no evidence of service of this affidavit on the contestant.

The General Land Office, in a decision of August 31, 1911, held that—

As the registered letter containing the notice was not delivered to Johnson personally by the postmaster at Schuyler and he failed to receive the notice until a later day, it must be held that he was not bound by his failure to answer within the time limited, under the provisions of Rules 7 and 14 of Practice.

In view of the denial made to the charges in the contest affidavit, the case is hereby remanded with instructions to set a day for hearing.

From this decision the contestant has appealed to the Department.

The Rules of Practice (rule 7) provide for the service of notice of contest by registered mail, and require that when so served "proof thereof must be accompanied by post-office registry return receipt, showing personal delivery to the party to whom the same is directed." Such return receipt has been filed, dated July 1, 1911, and signed "M. F. Johnson, Mrs. Anna Gardner," and also the receipt of the postmaster at Kimball, Nebraska, for this letter, for registration, on June 24, 1911.

The regulations of the Post Office Department (Official Postal Guide, Section 204) provide that the sender of registered mail may restrict its delivery by endorsement thereon and that—

Registered mail the delivery of which has not been restricted by the sender or addressee may be delivered to . . . a person authorized by the addressee to receive it.

It appears from the evidence, as well as from the admissions of the contestee, that the rule of this Department governing the issue of the notice of contest and the regulations of the Post Office Department, relative to the delivery of the same to the contestee, were fully complied with and it follows that the delivery of the registered letter to Johnson's agent, authorized by him, in writing, to receive it, must be regarded as the personal service contemplated by the rule of practice.

Adherence to law and the rules of practice is necessary to avoid confusion in the hearing of causes and for the protection of the rights of parties. *McKann v. Hatten* (11 L. D., 75).

The decision of the General Land Office could be sustained on the record as it then stood, on the ground that said office has the power to relieve the entryman from the effects of his default on a showing that his failure to answer was the result of mistake, inadvertence, surprise or excusable neglect. It appears, however, from the affidavits

of two witnesses, filed with the appeal, that Johnson was in Bentonville, stopping at a hotel kept by one of the witnesses, "off and on, every few days," during the period between July 1 and August 6, 1911. Copies of these affidavits were served on Johnson, to which he has made no answer. It seems probable, therefore, that he actually received the notice of contest soon after it was forwarded to him by Mrs. Gardner, or that if he did not, such failure was due solely to his own inattention, which, under the circumstances, was inexcusable and does not afford a sufficient basis for setting aside the default heretofore entered in the case.

On the failure of the entryman to serve and file answer to the contest charges, the local officers were justified in recommending the cancellation of the entry, as provided in rule 14 of Rules of Practice.

The decision appealed from is hereby reversed and the entry will be canceled.

TRACY v. JOHNSON.

On motion for rehearing, the departmental decision of May 29, 1912, 41 L. D., 124, was adhered to by Assistant Secretary Laylin, August 23, 1912; but in view of the additional showing made by affidavits filed on behalf of both parties, the case was remanded to the General Land Office with direction that hearing be ordered.

TRACY v. JOHNSON.

Petition for exercise of supervisory power to review departmental decision of August 23, 1912, *supra*, denied by Assistant Secretary Laylin, September 19, 1912.

WILLARD S. CARNS.

Decided June 1, 1912.

ADDITIONAL HOMESTEAD—SECTION 6, ACT OF MARCH 2, 1889—KINKAID ACT.

The provisions of section 6 of the act of March 2, 1889, authorizing additional homestead entries, apply only to ordinary homestead entries of less than 160 acres, and have no reference whatever to entries made under the provisions of the Kinkaid Act, allowing entries in certain territory not to exceed 640 acres.

ADAMS, *First Assistant Secretary*:

Willard S. Carns has appealed to the Department from the decision of the Commissioner of the General Land Office, of July 10, 1911, reversing the action of the local officers and holding for cancellation his homestead entry 012623, made October 31, 1910, for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 4, T. 33 N., R. 45 W., Alliance, Nebraska, land district, on the contest of Louis H. Abold.

The contest affidavit was filed January 27, 1911, charging that:

Willard S. Carns, prior to entering the above land had wholly exhausted his homestead right by entering the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$ of Section 33, town. 34, Range 45. Patent dated Sept. 26, 1902, and by entering Nov. 29, 1904, No. 9151, Serial 05355 for S. $\frac{1}{2}$ SW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 28, SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 29, E. $\frac{1}{2}$ NE. $\frac{1}{4}$ of Sec. 32 and N. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 33, Town. 34, R. 45. Proof submitted and made in July 1910, none of the above entries being contiguous.

It was admitted at the hearing before the local officers that contestee had made two former entries and made final proof therefor and received final certificates, as charged in the contest affidavit; that such former entries aggregate 560 acres of land, and that the entry under contest contained but 40 acres. No testimony was submitted.

The sole question presented upon this appeal is as to whether or not the provisions of section 6 of act of March 2, 1889 (25 Stat., 854), permitted contestee to make this second additional entry for 40 acres, as the total amount of the land entered by him with this entry only amounts to 600 acres. The provisions of said section 6 of the act of March 2, 1889, apply only to homestead entries of less than 160 acres of land, and have no reference whatever to entries made under the provisions of the so-called Kinkaid Act, allowing entries in certain territory not to exceed 640 acres.

It follows that the second additional entry made by contestee must be canceled and the decision appealed from is affirmed.

JOHN WAHE.

Decided June 6, 1912.

ROSEBUD INDIAN LANDS—PRICE OF LAND—ACT OF MARCH 2, 1907.

Where by mistake in description a tract of land not intended to be taken was included in a homestead entry of Rosebud Indian lands, opened to disposition by the act of March 2, 1907, and the entry was later amended by elimination of such tract, such erroneous entry will not be considered as fixing the price of the eliminated tract, so far as a subsequent entryman thereof is concerned; and in determining the price to be charged a subsequent entryman, under the graduated scale provided by said act of March 2, 1907, the period during which the land was erroneously embraced in the first entry should be eliminated from calculation and not considered, and the price fixed by adding together the period between the date of opening and the date of the first entry and the period between the date of the cancellation of that entry as to the tract in question and the date of the later entry.

THOMPSON, *Assistant Secretary*:

John Wahe has appealed from decision of July 18, 1911, by the Commissioner of the General Land Office, requiring additional payment of \$3.50 per acre upon 80 acres of the lands embraced in his homestead entry, made October 16, 1909, for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 12, and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 11, T. 95 N., R. 76 W., 5th P. M., Gregory,

South Dakota, land district, being a portion of the ceded Rosebud Indian lands opened to settlement and entry by the act of Congress approved March 2, 1907 (34 Stat., 1230).

The SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, and the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, of said township, being the south 80 acres of Wahe's entry, was formerly embraced in a homestead entry of John Hofeldt, which was made April 14, 1909, and subsequently amended to embrace other lands as the said entryman had made a mistake in the description of the lands he originally intended to enter. The amendment was authorized by the Commissioner's letter of August 14, 1909, and was apparently changed of record at the local land office August 18, 1909.

Wahe was permitted to make his said entry at the price of \$2.50 per acre. April 22, 1911, he submitted commutation proof and made final payment at the said rate of \$2.50 per acre for the entire 160 acres.

The said act under which the lands were opened reads, in part, as follows:

That the price of said lands entered as homesteads under the provisions of this act shall be as follows: Upon all land entered or filed upon within three months after the same shall be opened for settlement and entry, six dollars per acre, and upon all land entered or filed upon after the expiration of three months and within six months after the same shall have been opened for settlement and entry four dollars and fifty cents per acre; after the expiration of six months after the same shall have been opened for settlement and entry the price shall be two dollars and fifty cents per acre. * * * In case any entryman fails to make the annual payments, or any of them, promptly when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry, under the provisions of the homestead law, at the same price that it was first entered.

The lands were first opened to entry under the said act on April 1, 1909. See instructions of August 25, 1908 (37 L. D., 124), as modified by instructions of January 12, 1909 (37 L. D., 393). The object of graduating the price according to the period of time the lands should remain untaken was to more nearly equalize the price with reference to the value, it being assumed that the better lands would be first selected. This would naturally happen in the absence of mistakes by entrymen making the first selections. But where an applicant selected a tract properly considered of the first class, and by mistake a wrong description as to numbers was placed in the papers, and he was afterward allowed to amend his entry to embrace other tracts, it can not be said that such an entry in the least degree indicates that the land as first embraced in the entry was land of the first class. Such is this case. Hofeldt was permitted to amend his entry because he had made a mistake in description. He stated in his application to amend that the land embraced in his entry, as originally made, was of very poor quality and not worth \$6 per acre. There-

fore, said entry should not be considered as fixing the price of the land. But such entry, while of record, prevented entry of the land by other parties, and therefore the time should not be considered as running during the period the land was thus erroneously embraced in that entry. Said period should simply be eliminated from calculation and not considered in fixing the price. That entry segregated the land from other entry from April 14, 1909, to August 18, 1909. Eliminating this period, the land had been subject to entry two months and twelve days when Wahe made entry. This still leaves the land within the first period, as it had been subject to entry for less than three months. Therefore, the proper price of said 80 acres was \$6 per acre at the time Wahe made entry thereof. This he should be required to pay, if he desires to retain said land. The additional amount due is \$3.50 per acre for 80 acres. However, inasmuch as the allowance of his entry as to the said 80 acres was erroneous, he may relinquish the entire entry, or that portion erroneously allowed at \$2.50 per acre, and apply for repayment.

The decision appealed from is affirmed.

This decision is in lieu of one prepared in this case under date of May 29, 1912, but not promulgated.

JOHN WAHE.

Motion for rehearing of departmental decision of June 6, 1912, 41 L. D., 127, denied by First Assistant Secretary Adams, August 7, 1912.

TIMOTHY MAHONEY.

Decided June 7, 1912.

ADJOINING FARM ENTRY—SOLDIERS' ADDITIONAL RIGHT.

The making of an adjoining farm entry for an amount of land which added to the original farm aggregates 160 acres exhausts the homestead right; and such an entry can not be made the basis for a soldiers' additional entry of other lands.

CONTRARY DECISIONS OVERRULED.

Eri P. Sweet, 2 C. L. O., 18, and John R. Nickel, 9 L. D., 388, overruled.

ADAMS, *First Assistant Secretary*:

November 9, 1910, Timothy Mahoney filed his application to enter, under section 2307, Revised Statutes, as assignee of Mary Chapel, widow of Ezekiel Chapel, Jr., the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 35, T. 37 N., R. 79 W. (40 acres), Douglas, Wyoming, land district. In decision dated June 20, 1911, the Commissioner of the General Land Office held the evidence of posting and publication to be defective and required republication and reposting in compliance with paragraph 2 of the circular of February 21, 1908 (36 L. D., 278). No objection is made by the applicant to this requirement. The Commissioner of the General Land Office, however, further recited that as the claim is

based on the military service of Chapel and upon homestead entry, No. 544, made at Stevens Point, Wisconsin, by said Chapel, March 5, 1868, for the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec 12, T. 15 N., R. 9 E., as an adjoining farm, but no evidence as to the description of the area or the ownership of the original farm was submitted with said entry or furnished in response to call by the General Land Office of December 17, 1868, the entry which was canceled March 22, 1876, for failure to submit proof within the statutory period can not be considered as a legal basis for the right claimed until satisfactory evidence as to the description, area, and ownership of said original farm is submitted. From this requirement applicant has appealed to the Department.

Appellant contends that the requirement is in effect a ruling that before the adjoining farm can be accepted as a basis for the additional application, evidence must be submitted which is equivalent to final proof on the adjoining farm entry used as a basis. This contention is incorrect, as the requirement was only to the effect that proof should be submitted which will show that the adjoining farm entry was made by one having the qualifications prescribed by statute. The decisions cited by appellant as to the segregative effect of an existing uncanceled entry are not applicable to and do not control the question at issue here. Therefore, if an adjoining farm homestead entry could be made the basis of a soldiers' additional right, the decision of the Commissioner is correct. However, another, and more vital, objection to the allowance of the application, is present.

Section 2289, Revised Statutes, authorizing and permitting homestead entries upon public lands of the United States and limiting the area which may be entered to one quarter section or a less quantity of land, concludes by providing that—

Every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

In such cases residence upon and cultivation of the original farm for five years is treated as the equivalent of residence on and cultivation of the adjoining farm entry. Such an entry is not allowed to be made by one who has had the benefit of the general homestead law, even though for less than 160 acres. The purpose and intent of the provision as appears from the language used and from the remainder of the section, is to permit the owner of a tract of private land upon which he is residing to exercise the homestead right by entering contiguous public lands, and in order that such an entryman may not exceed the limit imposed by the preceding part of the section upon one who makes an original homestead entry, the area which may be acquired through an adjoining farm homestead entry is limited to that which shall, with the adjoining land already owned and occupied, not exceed 160 acres. The difference between the maximum

area securable by one who enters public lands under the first clause of section 2289 and securable by one who enters under the adjoining farm clause is made up to the latter by the provision which permits him to acquire title to the adjoining public land without removing from his original farm. He is not required to exercise and exhaust his homestead right by the entry of adjoining land but may, if otherwise qualified and through compliance with the general provisions of the homestead law as to settlement, residence upon, and cultivation of the land entered, acquire title to the full area granted by said law, but if he elects to take in lieu thereof the benefits accorded by the last clause of section 2289, viz, sufficient vacant land adjoining his original farm to make up the full 160 acres without the necessity of removing from his original farm, residence upon or cultivation and improvement of the area embraced in the adjoining farm entry, he, as above indicated, exhausts his homestead right, and such an entry can not be made the basis of a soldiers' additional entry for other lands, for it is in itself the equivalent of an ordinary homestead of 160 acres.

It appears from the record that in addition to the alleged 40-acre right presented as a basis in this case, Mary Chapel has also assigned two other 40-acre alleged additional rights, based upon said adjoining farm entry, and that applications to locate the same upon public lands have been made.

In a case similar in principle the Commissioner of the General Land Office held, December 10, 1874 (1 C. L. O., 163), that one Sweet, who had made an adjoining farm homestead entry of 80 acres, contiguous to an 80-acre tract of land owned by him, had exhausted his homestead right by acquiring, with his original farm, 160 acres and could not be permitted to make a soldiers' additional entry for other lands. On appeal this decision was reversed by the Secretary of the Interior February 27, 1875 (2 C. L. O., 18), and the latter decision was referred to and concurred in in the case of John R. Nickel (9 L. D., 388). Neither of the departmental decisions mentioned contains a full discussion of the laws applicable, nor does the reasoning, in my opinion, justify the conclusion reached. For the reasons hereinbefore set forth and those concisely stated in the opinion of the Commissioner first cited, I am convinced that an adjoining farm entry such as that hereinbefore described exhausts the homestead right and can not be made the basis of a soldiers' additional homestead right. The decisions reported in 2 C. L. O., 18, and 9 L. D., 388, will be no longer followed.

In the case at bar there is no evidence as to the area of the original farm made the basis for Chapel's Wisconsin entry. If it contained an area of 120 acres, he exhausted his right by the adjoining farm entry for 40 acres of public land, thereby securing a farm of 160 acres in area, the full limit allowable, under the provisions of said section 2289.

The decision of the Commissioner is affirmed and attention should be given to the other rights assigned by Mary Chapel and based upon the adjoining farm homestead here under consideration.

LENERTZ v. PARSONS.

Decided June 7, 1912.

COMANCHE, KIOWA, AND APACHE INDIAN LANDS—TIMBER AND STONE ENTRY.

Land ceded to the United States by the Comanche, Kiowa, and Apache tribes of Indians, and, by the act of June 6, 1900, made subject to disposal under the general provisions of the homestead, town-site, and mining laws, are not subject to disposal under the timber and stone act.

RELINQUISHMENT OF PORTION OF A LEGAL SUBDIVISION IN HOMESTEAD ENTRY.

Relinquishment of a homestead entry as to a part of a forty-acre legal subdivision, on the ground that it is mineral in character, will not be accepted unless the mineral character of the tract sought to be relinquished is shown to have been established in accordance with the requirements of paragraph (c) of section 37 of the general mining regulations of March 29, 1909.

ADAMS, *First Assistant Secretary*:

This case is before the Department on the appeal of John B. Lenertz from the decision of the Commissioner of the General Land Office of November 10, 1909, requiring him to show cause why his timber and stone entry, No. 03101, made March 6, 1909, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and W. $\frac{1}{2}$ SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 18, T. 4 N., R. 17 W., I. M., Lawton, Oklahoma, should not be canceled because erroneously allowed.

It appears from the record that on November 29, 1901, James A. Parsons made homestead entry, No. 7242 (serial 02589), for the SE. $\frac{1}{4}$, Sec. 18, T. 4 N., R. 17 W., I. M., upon which he offered final proof June 1, 1908; that on June 4, 1908, John B. Lenertz filed in the local office a corroborated affidavit of contest, in which he alleged that he had, on February 15, 1907, located a placer mining claim, valuable for building stone, known as the Gray Granite, No. 1, embracing the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 18, T. 4 N., R. 17 W., notice of which had been duly filed for record, and that the tract is unfitted and unsuitable for agricultural purposes, and is solely valuable for building stone found thereon; that on August 10, 1908, the local officers dismissed the protest, for the reason that the charge was not sufficient upon which to order a hearing; that on August 21, 1908, the protestant filed an appeal. It further appears that on November 20, 1908, the homesteader filed a relinquishment for the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and W. $\frac{1}{2}$ W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 18, T. 4 N., R. 17 W.; that on the same date final certificate was issued for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, and E. $\frac{1}{2}$ NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said section 18; that of the tracts relinquished the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ was entered on March 19, 1909, by Henry A. Gray as a homestead, and that on December 1, 1908, John B. Lenertz

filed timber and stone sworn statement for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and W. $\frac{1}{2}$ SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 18, T. 4 N., R. 17 W., upon which, after the submission of proof, final certificate, No. 03101, was issued March 6, 1909.

November 10, 1909, the Commissioner rendered his decision, holding that there is no authority for the allowance of an entry under the homestead or timber and stone laws for a portion of a 40-acre legal subdivision except where the remaining portion is embraced in a valid mining claim, and that it was error on the part of the local officers to have accepted the homesteader's relinquishment for the fractional portion described as the W. $\frac{1}{2}$ W. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said section 18 without a hearing to determine the mineral character of the land, and accordingly reinstated said homestead entry as to the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, allowed the timber and stone claimant to show cause why his entry should not be canceled, and ordered a hearing to determine the character of the land involved.

May 15, 1911, the local officers reported that a hearing was had under the order of November 10, 1909, at which both parties appeared in person and by attorneys and submitted testimony, and that a decision upon the record of such hearing had been rendered but had not been served.

The lands involved herein are a part of the tract ceded by the Comanche, Kiowa, and Apache tribes of Indians, the disposal of which was provided for by the act of June 6, 1900 (31 Stat., 672, 676), in the following terms:

That the lands acquired by this agreement shall be opened to settlement by proclamation of the President within six months after allotments are made and be disposed of under the general provisions of the homestead and townsite laws of the United States.

* * * * *

That should any of said lands allotted to said Indians, or opened to settlement under this act, contain valuable mineral deposits, such mineral deposits shall be open to location and entry, under the existing mining laws of the United States, upon the passage of this act, and the mineral laws of the United States are hereby extended over said lands.

The Department, in the case of *W. D. Harrigan* (29 L. D., 153), cited in the case of *Lenertz v. Malloy* (36 L. D., 170), commenting upon the act of June 20, 1890 (26 Stat., 169), which provided that certain withdrawn lands in Minnesota and Wisconsin should be restored to the public domain and "be subject to homestead entry only," held that such language was entirely free from ambiguity, left no room for construction, and clearly indicated that it was the intention of Congress to make the land subject to entry under the homestead law only, and thereupon decided that the portion of those lands therein involved was not subject to sale as an isolated tract, nor to entry as timber or stone land. The meaning of the language employed in the act of June 6, 1900, *supra*, appears to be

equally clear, and it follows that the land here involved is not subject to disposal under the timber and stone act.

There is nothing in the record to show that the procedure required by paragraph (c) of section 37 of the regulations of March 29, 1909 (37 L. D., 757, 764), was followed. It would therefore appear that it was error on the part of the local officers to accept a relinquishment for the fractional portions described.

For the reasons stated the decision appealed from is affirmed.

The local officers should now be directed to serve notices of their decision, rendered upon the record of the hearing as to the mineral character of the land, and to thereafter proceed in the regular way.

JOHN AULD.

Decided June 11, 1912.

ADDITIONAL ENTRY UNDER ENLARGED HOMESTEAD ACT.

A homestead entry upon which final proof was not submitted within the period fixed therefor by statute can not, after the expiration of such period, be made the basis for an additional entry under section 3 of the act of February 19, 1909.

ADAMS, *First Assistant Secretary:*

John Auld has appealed from decision of February 21, 1911, by the Commissioner of the General Land Office, holding for cancellation his homestead entry made October 1, 1909, for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 8, and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 9, T. 32 N., R. 17 E., M. M., now within the Havre, Montana, land district.

Said entry was made under section 3 of the enlarged homestead act of February 19, 1909 (35 Stat., 639), as additional to original homestead entry made May 27, 1902, for SW. $\frac{1}{4}$ NE $\frac{1}{4}$, W. $\frac{1}{2}$ SE $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 8 of said township. On February 23, 1910, the claimant submitted final proof covering both entries and final certificate issued thereon.

The statutory life of the original entry had expired prior to the making of the additional entry, and the Commissioner therefore held that the said additional entry was unauthorized.

Section 3 of the said enlarged homestead act reads as follows:

That any homestead entryman of lands of the character herein described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his former entry which shall not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

It will be observed that said section makes no provision for allowance of any entry under said act as additional to a former entry upon which proof has been offered. It is not conceivable that a right to make such additional entry could be gained by deferring the making

of final proof on an original entry beyond the fixed, legal statutory period. If proof be made upon the original entry, or if the statutory period within which such proof is required by law to be made expires prior to the making of additional entry, then the right granted by section 3 has lapsed and is of no avail. To hold otherwise would permit circumvention of the law and would grant a right clearly not intended in the act.

In certain cases where final proof has not been offered within the statutory period, the circumstances may justify submission of same to the Board of Equitable Adjudication for consideration, but this is an equitable remedy and not a legal right. Such cases are to be determined upon principles of equity and allowed only where the laches are determined to be excusable under the particular circumstances shown in the case. Claimant can not be heard to plead such laches in order to acquire a right to make an additional entry. His laches can only be excused, if at all, with reference to the entry in connection with which they occurred. Such equitable consideration of one entry can not be made the basis for enlarging the right so as to permit the making of another.

The additional entry will be canceled and the final certificate will also be canceled to the extent of the description of the land contained in the said additional entry.

Inasmuch as the additional entry was erroneously allowed, the claimant may apply for repayment of the money paid by him to the Government in connection therewith for fee and commissions.

The decision appealed from is accordingly affirmed.

THOMAS McMICHAEL.

Decided June 26, 1912.

SCHOOL INDEMNITY SELECTION—DOUBLE SELECTION ON SINGLE BASE.

A State will not be permitted to make a second school indemnity selection during the pendency of a prior selection based upon the same loss, and thus segregate two tracts upon a single base.

THOMPSON, *Assistant Secretary*:

Thomas L. McMichael appealed from decision of the Commissioner of the General Land Office of August 24, 1911, rejecting his application for homestead entry for SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 5, and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 6, T. 22 N., R. 20 W., M. M., Kalispell, Montana.

March 20, 1904, the State of Montana filed indemnity school selection for these tracts based on SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 16, T. 20 N., R. 21 W., lots 1 and 2, Sec. 36, T. 19 N., R. 22 W., and part of lots 6 and 7, Sec. 36, T. 22 N., R. 22 W., which selection is yet pending.

March 11, 1911, McMichael filed his application for the same land, which the local office rejected for conflict with the pending State selection. The Commissioner affirmed that action.

The appeal assigns error in rejecting the application. The school indemnity selection having received and being yet pending, there was no error in the decision, which is affirmed. Santa Fe Pacific R. R. Co., 34 L. D., 12, 13.

Subsequent to the appeal, February 27, 1912, appellant made affidavit that the selection here in question is the second one made on the same base, the first one being yet pending. This was not before the Commissioner at time of his decision and is no part of the case on appeal. The State can not be permitted to segregate two tracts from other appropriation upon a single base, but there has been no service of this charge upon the State, and no action can be taken here upon it. The charge is transmitted to the Commissioner for his consideration and action, which should be summary, if the charge be true.

THOMAS L. McMICHAEL.

Motion for rehearing of departmental decision of June 26, 1912, 41 L. D., 135, denied by Assistant Secretary Laylin, September 4, 1912.

EARL v. HENDERSON ET AL.

Decided June 26, 1912.

PRACTICE—CERTIORARI—RULE 79.

Rule 79 of Practice, suspending action for twenty days from service of notice of a decision of the Commissioner of the General Land Office denying the right of appeal, with a view to affording the party against whom the decision was rendered an opportunity to apply for certiorari, operates merely as a supersedeas for the period of twenty days, and is not a limitation upon the power of the Secretary of the Interior to grant an application for certiorari filed after the expiration of that period.

THOMPSON, *Assistant Secretary:*

William H. Earl has filed in the Department a petition praying that the proceedings in the above-entitled case be certified to the Department under Rules of Practice 78 and 79, for its consideration and action.

It appears that, by decision of April 19, 1912, the Commissioner declined to forward to the Department the appeal of Earl from his decision of February 19, 1912, dismissing petitioner's protest against the application of Charles B. Henderson, assignee of Florence R.

Hornbeck, widow of W. C. Hornbeck, to make soldiers' additional entry of the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 15, T. 32 N., R. 23 E., M. D. B. and M., Carson City land district, Nevada.

It seems that notice of the Commissioner's decision denying the right of appeal was served upon the protestant April 24, 1912, and that the said petition was filed in the Department May 16, 1912. A motion to dismiss the petition was filed by Henderson on the ground that the petition was not filed within twenty days from the date of service of notice of said decision upon the protestant, contending that, under Rules 78 and 79 of Practice, petitions for certiorari are required to be filed within twenty days from date of notice of the decision of the Commissioner denying the right of appeal. Said rules read as follows:

Rule 78. In proceedings before the Commissioner in which he shall decide that a party has no right to appeal to the Secretary, such party may apply to the Secretary for an order directing the Commissioner to certify said proceedings to the Secretary and suspend action until the Secretary shall pass upon the same; such application shall be in writing, under oath, and fully and specifically set forth the grounds upon which the same is made.

Rule 79. When the Commissioner shall decide against the right of appeal, he will suspend action on the case for twenty days from service of notice of such decision to enable the party against whom the decision is rendered to apply to the Secretary for an order certifying the record as herein above provided.

There is nothing in these rules that specifically requires a petition for certiorari to be filed within twenty days or any other definite period after notice of the decision of the Commissioner denying a party the right to appeal from his decision. Indeed, said Rule 79, which appears to be relied upon by Henderson to support his contention that the petition was filed out of time, is almost identical with Rule 85 of the former Rules of Practice of the Department (29 L. D., 725, 739), construing which the Department has held that it is well settled that said rule merely operates as a supersedeas for a period of twenty days, and is not a limitation upon the power of the Secretary to grant an application for certiorari even though not filed within that time. *Denman v. Domenigoni* (18 L. D., 41); *Henry D. Emerson* (20 L. D., 287); *Butler v. Robinson* (24 L. D., 385). It is therefore concluded that the petition is to be considered and the motion to dismiss is accordingly denied.

Upon careful examination of the petition, the Department is of opinion that the matters therein stated call for consideration by the Department. The Commissioner is accordingly directed to therewith certify to the Department the entire record in the case. Pending its determination, all proceedings affecting the land involved will be suspended.

MALONE LAND AND WATER COMPANY.

Decided June 27, 1912.¹

RIGHTS OF WAY—ACTS OF MARCH 3, 1891, AND MAY 11, 1898.

The grants of rights of way contained in the act of March 3, 1891, as amended by the act of May 11, 1898, are limited to "ditches, canals, or reservoirs," and should not be extended to include a conduit wherein water flows under pressure, as in a pipe line, unless it is a mere incidental connecting link in a conduit wherein water flows, as in a canal or ditch, as for example a culvert or an inverted siphon to carry an irrigating ditch past a stream.

RIGHT OF WAY—PIPE LINES—ACT OF FEBRUARY 15, 1901.

Applications for rights of way for pipe lines should be made under the act of February 15, 1901, which act specifically authorizes the Secretary of the Interior to permit the use of rights of way for "pipes and pipe lines, flumes, tunnels, or other water conduits."

ADAMS, *First Assistant Secretary*:

Under date of May 31, 1912, the Commissioner of the General Land Office submitted, with recommendation for approval, the application of the Malone Land and Water Company, a corporation organized under the laws of the State of California, for right of way under the provisions of the act of Congress approved March 3, 1891 (26 Stat., 1095), as amended by act of May 11, 1898 (30 Stat., 404), for a water conduit or pipe line in Sec. 22, T. 3 S., R. 2 E. The grants contained in said acts of March 3, 1891, and May 11, 1898, *supra*, are limited to "ditches, canals, or reservoirs," and should not be extended to include a conduit wherein water flows under pressure, as in a pipe line, unless it is a mere incidental connecting link in a conduit wherein water flows, as in a canal or ditch, as for example a culvert or an inverted siphon to carry an irrigating ditch past a stream.

The act of February 15, 1901 (31 Stat., 790), specifically authorizes the Secretary of the Interior to permit the use of rights of way for "canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits."

Accordingly, the Department must deny the application for right of way presented in this case and same is herewith returned unapproved. Due notice hereof will be given to the applicant company with information that, if it desires to secure a permit for a right of way under the act of February 15, 1901, *supra*, the application should be amended accordingly and submitted to the proper Department.

JASPER N. WILKERSON.

Decided June 29, 1912.

ADDITIONAL HOMESTEAD—SECTION 6, ACT MARCH 2, 1889—ENLARGED HOMESTEAD.

One who by making adjoining farm entry exhausted his homestead right is entitled under the provisions of section 6 of the act of March 2, 1889, if otherwise qualified, to make another entry for such an amount of land

¹As modified October 25, 1912.

as added to the amount embraced in the adjoining farm entry will not exceed 160 acres; but is not entitled to make further entry, by virtue of the provisions of section 3 of the enlarged homestead act of February 19, 1909, as additional to the entry made under the act of 1889.

ADAMS, *First Assistant Secretary*:

Referring to your letter of May 22, 1912, requesting instructions concerning the existing homestead entries of Jasper N. Wilkerson, it appears that on February 13, 1895, Wilkerson made adjoining farm homestead entry at Springfield, Missouri, for 40 acres, claiming as his original farm 120 acres contiguous thereto. Patent issued on said adjoining farm homestead entry November 15, 1902.

October 5, 1906, Wilkerson made homestead entry, Fort Sumner 03671, New Mexico series, for 120 acres. October 14, 1909, he made homestead entry for 160 acres contiguous to the last-mentioned entry, under section 3 of the act of February 19, 1909 (35 Stat., 639), serial 07150, Fort Sumner series. Final proof was submitted on the last two mentioned homestead entries October 12, 1911, and certificate was issued November 15, 1911.

You express the opinion that the entry first made in New Mexico for 120 acres is valid under section 6 of the act of March 2, 1889 (25 Stat., 854), and that the entry made additional thereto under the enlarged homestead act is also valid, but request instructions in the premises.

For the reasons set forth in departmental decision of June 7, 1912, in the case of Timothy Mahoney, assignee of Mary Chapel, widow of Ezekiel Chapel, Jr., the adjoining farm homestead entry made and perfected by Wilkerson exhausted his rights under the homestead law then in force. Section 6 of the act of March 2, 1889, however, is, in requirements and effect, not an additional homestead entry law. It grants those persons otherwise qualified who have exhausted their homestead right by the entry of less than 160 acres of land under the homestead law, who have earned and received patent thereon by performing the required residence and cultivation, the right to make another homestead entry of the area which, added to that contained in the original and patented entry, shall not exceed 160 acres. As in other cases where the homestead right is restored, it requires full compliance with the homestead laws as to residence and cultivation of the lands included in the new entry. It is clearly distinguishable from acts like that contained in section 2306, Revised Statutes, which grant an additional entry irrespective in some instances of whether the original entry was perfected and without requirement as to residence and cultivation upon the lands included within the additional entry. Therefore, while Wilkerson had exhausted his homestead right by the adjoining farm entry hereinbefore described, such right was restored by the said section 6 of the act of March 2, 1889, but only to a limited extent, and his entry for 120 acres may, if full com-

pliance with the homestead laws has been had thereunder, be permitted to proceed to patent, but thereby his homestead right was again exhausted.

It follows as a consequence that there was no additional right given upon this latter entry and the right granted by the act of 1889 was not enlarged by the provisions of the act of February 19, 1909. See instructions of April 2, 1912 (circular No. 94).

The entry 07150 made as an additional under the act of February 19, 1909, *supra*, must therefore be canceled. You are directed to take up and adjudicate said entries in accordance with the views herein expressed.

EDWARD W. POLLARD.

Decided July 25, 1912.

PATENT—VACATION—JURISDICTION OF LAND DEPARTMENT.

Where a patent, erroneously issued to a railway company for a tract of land excepted from its grant by a valid settlement existing at the date of definite location, is by a court of competent jurisdiction declared a nullity, and such judgment becomes final, the railway company and all persons claiming under it are thereby concluded and estopped to assert title under the patent, and the land department may accept the judgment of the court and dispose of the land as public land of the United States.

ADAMS, *First Assistant Secretary*:

The Commissioner of the General Land Office transmitted, October 14, 1911, a petition filed by Edward W. Pollard that he be allowed entry for N. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 21, T. 6 N., R. 1 W., La. M., New Orleans, Louisiana.

The NW. $\frac{1}{4}$, Sec. 21, is within primary limits of grant for New Orleans, Baton Rouge and Vicksburg Railroad Company by act of March 3, 1871 (16 Stat., 573, 579). The grantee assigned its rights to the New Orleans Pacific Railway Company, and by act of February 8, 1887 (24 Stat., 391), the assignment was confirmed as to a portion of the grant, the remainder being forfeited and the land restored to the public domain. This tract is within that part of the grant confirmed, and is opposite that part of the road definitely located November 17, 1882. It was listed by the company November 13, 1883, and patented March 3, 1885.

Section 2 of the act of February 8, 1887, provided:

That all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States.

Section 6 of the act provided:

That the patents for the lands conveyed herein that have already been issued to said company be, and the same are hereby, confirmed; but the Secretary of

the Interior is hereby fully authorized and instructed to apply the provisions of the second, third, fourth, and fifth sections of this act to any of said lands that have been so patented, and to protect any and all settlers on said lands in all their rights under the said sections of this act.

July 2, 1894, Pollard applied to enter the NW. $\frac{1}{4}$, Sec. 21, as his homestead. The company was notified and filed its objections, and hearing followed upon the *bona fides* of Pollard's settlement, which resulted, by decision of the Commissioner of the General Land Office May 17, 1895, in Pollard's favor, the Commissioner finding, in part, as follows:

As it is shown that the land was occupied by an actual settler at the date of definite location, and is in the possession of the homestead claimant, as the assignee of such settler, the claim is protected by the second section of the act of February 8, 1887, *supra*, and the land was erroneously patented to the railway company.

In accordance with the agreement filed by the company, and embodied in Departmental letter of December 16, 1892 (15 L. D., 576), the claim of the company is rejected and the case closed.

The company will be requested to reconvey the tract to the United States, in order that Edward W. Pollard may enter the same under the homestead laws.

By letter of that date the company was required to reconvey this land to the United States in order that Pollard might perfect his homestead claim. February 20, 1896, the company failing to reconvey, the case was reported to the Department for suit to recover title. Suit was subsequently instituted against the company to recover title to this and other land held to have been erroneously patented to it. Subsequently the company reconveyed the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ to the United States, but failed to reconvey the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$. January 23, 1900, Pollard relinquished his claim to the latter tracts, which the local office forwarded, and was transmitted to the Department March 7, 1901. The Acting Secretary, April 8, 1901, advised the Commissioner that the Attorney-General had been requested to dismiss the suit instituted by the United States against the company as to the tracts last above described, and returned Pollard's relinquishment for filing, and directed Pollard's claim should stand rejected. April 26, 1901, the Commissioner advised the local office that Pollard's claim was rejected as to these tracts, and the contest was closed. September 25, 1901, Pollard made homestead entry for SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, reconveyed by the company, and patent issued to him September 6, 1902.

With Pollard's petition is printed copy of decision by the Supreme Court of Louisiana, rendered June 15, 1911 (55 So. Rep., 689). That decision was in a suit brought by George J. Gould *et al.* claiming under patent to the railway company through mesne conveyances and inheritance. It was also sought in the action to recover damages for waste by cutting timber and to enjoin further waste. The plaintiff

impleaded Pollard as defendant. He made defense on the ground that patent to the railway company was void because of his prior settlement, alleging that his relinquishment was obtained by fraud and misrepresentation. The opinion found in Pollard's favor on all the issues of fact, among other things, as follows:

(2) Whether, in the case at bar, Pollard was such an actual settler, within the meaning of the act of 1887, as to exclude the whole of the land here claimed from the grant to the railway company is a question that was put at issue by the contest which the company made against Pollard's application to enter the land as a homestead, and, according to the agreement referred to in the act mentioned, the decision of that question by the commissioner, to the effect that "the land was erroneously patented to the railway company," was final and conclusive as against the company; and, whatever other effect the subsequent relinquishment, in favor of the company by Pollard, of his rights as an applicant for a homestead, may have had, it could not have vested the title of the land in the company, nor could it have put the company in Pollard's place as an eligible applicant for a homestead, for the title was, and still is, vested in the government (*Shiver v. United States*, 159 U. S. 493, 16 Sup. Ct. 54, 40 L. Ed. 231). . . . It is, however, a fact that, though he did so upon the faith of representations and promises which have not been made good, and wholly without other consideration, Pollard did execute a written instrument relinquishing the homestead claim which he had placed on record in the Land Office; and, as the officers of that department had no means of knowing why he did so, and had no right to inquire, or to compel him to prosecute his claim, against his will, there was nothing for them to do but to accept the relinquishment and reject the claim. But the action so taken did not validate the patent which had been erroneously issued to the railway company, or vest in that company a title to land which had never been granted to it, and it may be that, upon a proper presentation of the case, the officers of the land department will see their way to the reinstatement of Pollard in the position that he occupied before his relinquishment was executed and filed. . . . we are of opinion that the judgment in this case should go no farther than to decree that the plaintiffs, claiming the land, have exhibited no title, and that their claim should be rejected, with such damages as defendants have sustained, leaving the question of Pollard's title, as between him and the United States, to be acted on, primarily, by the proper officers of the Interior Department.

It is thus seen that the suit was not for cancellation of the patent, but to determine the title purported to be conveyed by the patent, and the holding of the court was that no title passed by the patent. In other words, that the patent was a nullity for want of authority in the land department to issue it for this land.

The general rule is that when a patent has been issued for public land, the land department loses all jurisdiction over the matter, and can not grant another patent until the former one is canceled. *Moore v. Robbins*, 96 U. S., 530. Other decisions to the same purport might be cited. They all proceed upon the theory that title passed by the patent. The present case presents a different question—namely: Whether land passes beyond jurisdiction of the land department when the patent itself is a nullity and conveys no title.

It is obvious that if a patent is a nullity and conveys no title, the land does not cease to be public land. That a patent may be a nullity and fail to convey title is recognized by many decisions of the Supreme Court of the United States. It was so ruled as long ago as 2d Howard, 318, in *Stoddard v. Chambers*; *Easton v. Salisbury*, 21 Howard, 429, 431. In *Morton v. Nebraska*, 21 Wallace, 660, a patent had been issued upon location of soldiers' military bounty land warrants shown to be non-saline, agricultural land upon the plats of the local land office, and field-notes of survey as returned by the surveyor-general to the General Land Office. The saline character was obvious upon face of the land itself, and the deputy surveyor had entered the saline character in his field-notes, which the surveyor-general suppressed, and the land as returned to the General Land Office appeared to be agricultural. Morton claimed the land under patent issued by the land department. The State claimed the land by its grant of twelve saline springs, this particular land being one of the State selections. Morton brought an action of ejectment, a suit at law, against the tenants of the State to recover possession. There was no cross bill in equity, and the question adjudged was one of law simply. The court held:

It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law.

In *Burfenning v. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 163 U. S., 321, Burfenning was the holder of patent title to an island in the Mississippi River, having obtained its survey. The railway company trespassed upon the land, building the abutment of a bridge, and Burfenning brought an ejectment suit for possession against the railway company. The State court held the patent to be void because the land department was without jurisdiction to grant or dispose of overflowed lands in the channel of a navigable stream. The State court held the patent void and the Supreme Court affirmed that action, holding:

But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preemption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof.

In *Mobile Transportation Company v. Mobile*, 187 U. S., 479, the suit was an action of ejectment by the city of Mobile against the

Mobile Transportation Company to recover possession of a piece of land between high and low water mark on the shore of the Mobile River, a navigable stream. The land had been patented, after the admission of the State, December 28, 1836, to the assignees of one Bernoudy, a Spanish grantee. Under Bernoudy the patentee, by connected conveyances regular in form, the Mobile Transportation Company had apparent title. The State court held the patent was a nullity as to land below water mark, and the Supreme Court affirmed that action.

In *Nelson v. Northern Pacific Railway Company*, 188 U. S., 108, the suit was one of ejectment by the railway company claiming under a patent of the United States land which had been in the possession of Nelson, as a settler claiming a right of homestead entry from prior to the date that the railroad company made definite location of its line. Although the railway company had a patent, it was adjudged by the court to be void, conveying no title because the land was excepted from the grant prior to definite location of the road and no title passed by the patent.

The present case is one of similar character. The Commissioner of the General Land Office and the Supreme Court of the State of Louisiana have affirmatively found that, February 8, 1887, when the grant was confirmed opposite to this land to the present company, Pollard was in possession holding under a *bona fide* settlement and claiming a right of entry. The State court further found that he was induced to relinquish this right by a fraud of the railway company and was not bound by his relinquishment. The railroad company has not appealed that judgment to the Supreme Court of the United States, although a federal question was involved, and it might have invoked that jurisdiction. The judgment has become final and the railway company is concluded against asserting title under its patent, which is the same thing as being concluded against asserting that it ever acquired title. It follows that the railway company and all persons under it are by this decision, rendered by a competent court in a suit between proper parties, concluded and estopped to assert that the land has ever ceased to be public land of the United States. All parties in interest being concluded by judgment of a court of competent jurisdiction, the land department may accept it and take up and dispose of the land as public.

The petition will therefore be granted and Pollard's application for entry will be allowed.

ALBERT L. WOODHOUSE ET AL.

Decided July 26, 1912.

COAL LAND WITHDRAWAL—PROVISO TO SECTION 3, ACT OF JUNE 22, 1910.

The last proviso to section 3 of the act of June 22, 1910, applies only to "lands which have been classified as coal lands," and furnishes no authority to receive an application to locate, enter, or select lands which have been merely withdrawn for classification but not yet classified, and holding the same suspended pending the result of a hearing upon the request of the applicant to determine the character of the land with reference to its coal value.

ADAMS, *First Assistant Secretary*:

Albert L. Woodhouse has appealed from decision of November 29, 1911, by the Commissioner of the General Land Office, affirming the action of the local officers rejecting his application to enter lot 1, Sec. 34, T. 6 S., R. 13 E., B. M., containing 30.20 acres, Hailey, Idaho, land district, based upon assignment of 40 acres of the alleged soldiers' additional right of Samuel D. Cutcliffe, who, it is alleged, served in the army of the United States during the Civil War for the required length of time, and who made homestead entry April 7, 1865, for 80 acres, at Minneapolis, Minnesota. Oral hearing was granted upon this appeal, at which Floyd Norman was represented by attorney, who participated in the argument.

The tract applied for was selected by the State of Idaho under the Carey Act, and was segregated thereunder upon approval of the Secretary under date of March 30, 1904. Relinquishment by the State was filed August 16, 1911, and the selection was canceled as to the said tract on September 6, 1911. It appears that during the time the land was segregated under the State selection Woodhouse procured assignment of the rights of a claimant, who had entered into a contract with the State therefor, and it appearing impossible to acquire title under the Carey Act, Woodhouse caused relinquishment of the State to be filed and he submitted at the same time the said soldiers' additional claim and attempted to locate same on said tract. His application was rejected for the reason that the land was at that time embraced in a withdrawal for coal classification. He did not appeal specifically from the said ruling of the local officers but promptly filed a petition with the General Land Office for classification of the lands as noncoal in character, alleging that same were well known to be of no value for coal deposits.

In the meantime one Charles W. French filed protest against the allowance of the application of Woodhouse upon the allegation that the land applied for was chiefly valuable for power-site purposes.

The Commissioner in the decision appealed from held that the local officers correctly rejected the application of Woodhouse. The

protest of French was dismissed and the petition for classification was denied.

There has been filed with the Department a motion by Floyd Norman, asking that the appeal of Woodhouse be dismissed for the alleged reason that he failed to appeal from the action of the local officers in rejecting his application to enter. Norman further states that on November 28, 1911, he filed homestead application for said tract, which application was on the 8th day of December, 1911, suspended by the local officers pending a disposition of the application of Woodhouse.

Charles W. French, the said protestant, is further urging his protest. There appears to be no merit in the protest of French, inasmuch as the objections urged by him, other than that shown by the record, afford no reason for rejection of the application of Woodhouse. Accordingly the protest of French is dismissed.

Regarding the motion of Norman to dismiss the appeal of Woodhouse for the reasons stated, it is sufficient to say that it appears that Woodhouse understood that he was prosecuting his claim to the land under the application in the most appropriate manner, and even though said petition for classification and allowance of his application was not strictly an appeal from the action taken by the local officers, yet the case will receive consideration by the Department as though a technical appeal had been filed. Said motion is accordingly denied.

By Executive order of August 24, 1910, the land in question was "withdrawn from settlement, location, sale, or entry, and reservation for examination and classification with respect to coal value," by the President under authority of the act of June 25, 1910 (36 Stat., 847), subject to all the provisions, limitations, exceptions, and conditions contained in that act and the act of June 22, 1910 (36 Stat., 583). Said withdrawal was revoked by the President December 1, 1911, as to the land here in question, together with other lands, for the reason that same was classified as noncoal in character. But while that order of withdrawal remained in force, the land was not subject to soldiers' additional location, as such application is not one of the class mentioned in the body of section 1 of the act of June 22, 1910, *supra*. See case of Jacob Jenne (40 L. D., 408). No rights could be gained by the filing of such application while the land occupied that status.

It is urged that while such application could not be allowed at that time, yet the application should have been received and suspended awaiting result of a hearing upon the request of applicant to determine the character of the land with reference to its coal value. This contention is made in view of the last proviso to section 3 of said act of June 22, 1910, which reads as follows:

That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or

select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation.

It is very clearly stated in the act that the right to such hearing with a view to securing a patent without reservation, applies to "lands which have been classified as coal lands." Such hearing is to be had "with a view of disproving such classification." Therefore, the position of the Department has been that hearing will not be had upon any application until after classification. See section 5 of instructions of September 8, 1910 (39 L. D., 179, 182).

It is argued that the greater includes the lesser; that it having been provided that an applicant may have a hearing upon land classified, it follows perforce, that lands which have not been as yet taken out of the agricultural class by classification as coal lands, may be the subject of inquiry as to their coal character upon the request of an intending entryman under any agricultural land law. Concerning this argument, it is sufficient to say, that lands so withdrawn are subject to entry only in the manner provided in the act of June 22, 1910; that the withdrawal is for the purpose of classification, which is to be accomplished in such manner as may be found most appropriate to effect that purpose; that to permit controversies between applicants and the Government concerning the character of the land prior to such classification, would not only harass the Government in effectuating the purpose of the withdrawal, but would also cause needless expense and labor in connection with many tracts that probably would be eliminated from withdrawal upon classification and thus render unnecessary any hearing upon the question, as shown in this very case. This amply justifies the law in making provision for a hearing only after classification.

This land was withdrawn as above stated but not classified at the time Woodhouse filed his application. Therefore, the application was properly rejected by the local officers, and the petition for a hearing was properly denied by the Commissioner.

As a general rule an application to enter lands not subject thereto creates no right in the applicant and his appeal entitles him to a judgment only as to the correctness of the action when taken. Further, the fact that the cause for rejection of the application is removed during the pendency of the case on appeal entitles the applicant to no special consideration as against the right of another intervening after the land became subject to disposition. In this case, however, it is represented that there are equities in favor of Woodhouse entitling him to favorable consideration as against Norman, whose good faith is directly attacked.

It is alleged that Woodhouse first sought information at the local land office as to whether there was any claim to this land which

would bar entry in the event the withdrawal or relinquishment of the claim under the Carey Act should be filed, and that upon being informed that the land would thereupon be subject to entry, the relinquishment under the Carey Act claim was secured and scrip purchased, both being filed at one time in the local land office. Further, that the land has no possible value for agriculture or a home and is particularly valuable to Woodhouse, and that the purpose of the homestead applicant is merely to defeat the intentions of Woodhouse and those whom he represents respecting the future use of this land. If these representations are maintained there would seem to be no reason why Woodhouse's application might not be respected as of the date the lands became subject to disposition.

Upon this showing it is deemed advisable to remand the matter to the Commissioner of the General Land Office with direction that a hearing be ordered after notice to Woodhouse and Norman, with full opportunity to each to make showing in support of the claim now being asserted, the expense of the hearing to be assessed under the second clause of Rule 53 of Practice. To this end the decision of the Commissioner of the General Land Office, rejecting Woodhouse's application, is hereby vacated.

ENTRIES OF UINTAH LANDS—EXTENSION OF TIME FOR PROOF— ACT OF JULY 20, 1912.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 8, 1912.

REGISTER AND RECEIVER,
United States Land Office, Vernal, Utah.

SIRS: Your attention is directed to the act of Congress approved July 20, 1912 (Public, No. 234), which reads as follows:

That any person who has heretofore made a homestead entry for land which was formerly a part of the Uintah Indian Reservation in the State of Utah, authorized by the act approved May 27, 1902, and acts amendatory thereto, shall, upon application to the register and receiver of the land office in the district in which the land is located, and upon payment of five per centum of the price of said land, be allowed an extension of time of one year within which to submit proof on his entry and make payment therefor: *Provided*, That said five per centum shall be accepted as interest for said year, and shall be deposited in the Treasury to the credit of the Indians as a part of the proceeds received for the lands: *Provided further*, That any entryman may, upon the same conditions, obtain a second extension, and no more.

SEC. 2. That nothing herein contained shall affect any valid adverse claim initiated prior to the passage of this act.

1. No formal application will be required, in order to secure the extension of time provided by this act. The homestead claimant must make payment in advance of a sum equal to five per cent of the price of the land and thereupon the extension will be effective without further action.

2. The time for proof will be extended similarly for a second year, provided a second payment of five per cent of the price of the land be made.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

SAMUEL ADAMS,

First Assistant Secretary.

ADDITIONAL ENTRIES UNDER ENLARGED HOMESTEAD ACTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., August 14, 1912.

REGISTERS AND RECEIVERS,

United States Land Offices, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, Utah, Washington, and Wyoming.

GENTLEMEN: In a decision rendered June 11, 1912 (in the case of John Auld, Havre series 08277, 41 L. D., —), the department held that where a person has an entry under the general homestead law more than seven years old, he is not entitled to make an additional entry under section 3 of the enlarged homestead act of February 19, 1909 (35 Stat., 639), or June 17, 1910 (36 Stat., 531), though proof has not been submitted on the original entry.

The department in that decision said:

It will be observed that said section (3) makes no provision for allowance of an entry under said act as additional to a former entry upon which proof has been offered. It is not conceivable that a right to make such additional entry could be gained by deferring the making of final proof on an original entry beyond the fixed, legal statutory period. If proof be made upon the original entry, or if the statutory period within which such proof is required by law to be made expires prior to the making of additional entry, then the right granted by section 3 has lapsed and is of no avail. To hold otherwise would permit circumvention of the law and would grant a right clearly not intended in the act.

The department further says that while the board of equitable adjudication may, upon a proper showing, confirm the original entry,

notwithstanding submission of the proof after expiration of the statutory period of seven years, the fact that an entryman may show himself entitled to equitable consideration by the board would not operate to confer upon him the right of additional entry.

You will govern yourselves by the principles above indicated, and reject all applications for additional entry filed under the conditions named in the decision. The same principles will apply where the expiration of the statutory life of an entry occurs under the provisions of the act of June 6, 1912 (Public, No. 179).

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

SAMUEL ADAMS,

First Assistant Secretary.

SAN CARLOS RESERVOIR SITE.

Motion for rehearing of departmental decision of February 17, 1912, 40 L. D., 470, denied by First Assistant Secretary Adams, August 16, 1912.

RIGHTS OF WAY FOR POWER PURPOSES THROUGH PUBLIC LANDS AND RESERVATIONS (EXCEPT NATIONAL FORESTS).

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
Washington, August 24, 1912.

GENERAL STATEMENT.

1. The act of February 15, 1901, c. 372 (31 Stat., 790), entitled "An act relating to rights of way through certain parks, reservations, and other public lands," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacture or cutting of timber or

lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

2. This act, in general terms, authorized the Secretary of the Interior, under regulations to be fixed by him, to grant permission to use rights of way through the public lands, forest, and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks in California, for every purpose contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat., 1095, 1101), and by acts of January 21, 1895 (28 Stat., 635), May 14, 1896 (29 Stat., 120), and May 11, 1898 (30 Stat., 404), and for other purposes additional thereto, *except for tramroads, the provisions relating to tramroads, contained in the act of 1895 and in section 1 of the act of 1898, aforesaid remaining unmodified and not being in any manner extended*.

3. Although this act does not expressly repeal any provision of law relating to the granting of permission to use rights of way contained in the acts referred to, yet in view of the general scope and purpose of the act, and of the fact that Congress has, with the exception above noted, embodied therein the main features of the former acts relative to the granting of a mere permission or license for such use, it is evident that, for purposes of administration, the later act should control in so far as it pertains to the granting of permission to use rights of way for purposes therein specified. Accordingly all applications for *permission* to use rights of way for the purposes specified in this act must be submitted thereunder. Where, however, any canal or ditch company formed for the purpose of irrigation, any individual, or association of individuals, seeks to acquire a right of way for irrigation canals, ditches, or reservoirs under said sections of the act of March 3, 1891, and section 2 of the act of May 11, 1898,

supra, the application must be submitted in accordance with the regulations issued under said acts.

4. By section 1 of the act of February 1, 1905 (33 Stat., 628), it is provided:

That the Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands.

5. Under this section it has been determined that the Department of Agriculture is invested with jurisdiction to pass upon all applications under the said act of February 15, 1901, for permission to occupy and use lands in national forests.

6. Therefore when it is desired to obtain permission to use a right of way over public lands within a national forest an application should be prepared in accordance with the regulations issued by the Department of Agriculture and the same submitted to the proper officer of that department, as in these regulations more fully set forth.

7. Any occupancy or use of public lands, reservations, parks, or national forests for the purposes set forth in the statute, except under permit first secured from the proper department, is trespass.

8. The statute does not make a grant in the nature of an easement, but authorizes a mere permission revocable at any time, and it gives no right whatever to take from public lands, reservations, parks, or national forests adjacent to the right of way any material, earth, or stone for construction or other purpose.

9. The final disposal by the United States of any tract traversed by a right of way permitted under this act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act. (Secretary to Commissioner of General Land Office, Aug. 23, 1912.)

10. Permission may be given under this statute for rights of way through unsurveyed as well as surveyed lands.

11. The following regulations govern the issuance of permits under the said act of February 15, 1901, for the development, transmission, and use of power. Permits for the other purposes enumerated in the statute are issued in accordance with the "Regulations concerning right of way over public lands and reservations for canals, ditches, and reservoirs, and use of right of way for various purposes," approved June 6, 1908, sections 37-45, inclusive (36 L. D., 579-583).

Said sections are hereby superseded so far as they relate to permits for the development, transmission, and use of power.

REGULATIONS.

REGULATION 1. Preliminary power permits issued by the Secretary of the Interior allow the occupancy of the public lands and reservations of the United States (except national forests) and of the Yosemite, Sequoia, and General Grant National Parks, all hereinafter called "Interior Department lands," for the purpose of securing the data required for an application for final permit. Final power permits issued by the Secretary of the Interior allow the occupancy and use of Interior Department lands for the construction, maintenance, and operation of storage reservoirs and power plants for the development, transmission, and use of power. Final permits will be issued only in case it appears that the proposed occupancy and use will be in general accord with the most beneficial utilization of the resources involved. All permits will be issued, extended, renewed, or revoked only by the Secretary of the Interior, hereafter in these regulations called "the Secretary."

REG. 2. Application for preliminary or final power permits for occupancy or use of lands of the United States should be submitted as follows:

For Interior Department lands: To the local land office of the land district in which the lands are situated. If the lands are situated in more than one district, the lands in both districts shall be embraced in one set of application papers, which shall be submitted in any one of such districts at the option of the applicant, who shall submit to the local land office in each of the other districts a print copy of the maps submitted to the local land office of the first district.

For national-forest lands: To the district forester of the district in which the lands are situated, unless otherwise directed by the regulations of the Department of Agriculture.

For lands in part national-forest lands and in part Interior Department lands: In the same manner as for national-forest lands, but the applicant shall also submit to the local land office in the land district in which the Interior Department lands are situated such maps and papers and copies thereof as are required in these regulations. Where original maps and papers hereby required to be submitted to the local land office have been first submitted to the Department of Agriculture under this paragraph, copies thereof to the same number as required by these regulations may be submitted to the local land office in lieu of originals.

REG. 3. Priority of consideration of applications for final power permits shall be initiated in the order of filing complete applications

whether such applications shall be for preliminary permit as prescribed in regulation 10 or for final permit as prescribed in either regulation 11 or regulation 12. If a preliminary permittee shall file such complete application for final permit before loss of priority initiated by the application for preliminary permit, the priority so initiated shall be maintained by the application for final permit and be effective as of the date of the application for the preliminary permit. Priority shall be maintained, however, only in so far as the projects shown in the application for final permit are within the approximate limits of diversion and discharge as shown in the application for the preliminary permit. Priority initiated or maintained by an application for final permit shall be lost if the applicant fails to make the payment required and to return a duly executed agreement, as prescribed in regulation 14 or in regulation 15, within 90 days from a date fixed in the letter transmitting such agreement to him, unless a longer time is allowed by written authority of the Secretary. Priority initiated by an application for preliminary permit shall be lost: (1) if the initial payment is not made within 60 days of demand therefor; or (2) if the application for final permit is not filed within the time required in the preliminary permit. Priority initiated or maintained by an application for a permit shall be lost if the permit is revoked. No other application for a like use, covering in whole or in part the same lands, will be accepted from the permittee whose priority is lost until the expiration of one year thereafter.

REG. 4. No final power permit will be issued if the works to be constructed thereunder would in any way be incompatible with works operated or constructed or to be constructed under an existing final power permit. No final power permit will be issued for the construction of works within an area covered by a prior preliminary permit until after the filing of final application or the loss of priority by the prior preliminary permittee. Applications for final power permits involving in whole or in part the same lands will be examined in order of their priority, but before the issuance of final permit consideration may be given, in the discretion of the Secretary, to the financial ability and business connections and affiliations of the applicants. Successive preliminary permits may be issued covering the same power site, but in each successive preliminary permit it shall be specified that such permit is subordinate to all outstanding prior permits and shall not adversely affect any rights thereunder.

REG. 5. The applicant must file the evidence of initiation of water appropriation in these regulations hereafter required. Thereafter no protest against the issuance of a permit, if based upon alleged lack of water rights, will be considered; nor, in general, will any allegation that the time of beginning or completion of construction has been

or is delayed by litigation over water rights be accepted as a sufficient reason for granting any extensions of time.

REG. 6. Unless sooner revoked by the Secretary, a final power permit shall terminate at the expiration of 50 years from the date of the permit. If, however, at any time not less than 2 nor more than 12 years prior to the termination of the permit, the permittee shall formally notify the Secretary that he desires a new permit to occupy and use such lands as are occupied and used under the existing permit, and will comply with all then existing laws and regulations governing the occupancy and use of lands of the United States for power purposes, the existing permit will be considered as an application for such new permit.

REG. 7. The following terms, wherever used in these regulations, shall have the meaning hereby in this regulation assigned to them respectively, viz:

“Power business” means the entire business of the applicant or permittee in the generation, distribution, and delivery of power by means of any one power system, together with all works and tangible property involved therein, including freeholds and leaseholds in real property.

“Power system” means all interconnected plants and works for the generation, distribution, and delivery of power.

“Power project” means a complete unit of power development, consisting of a power house, conduit or conduits conducting water thereto, all storage or diverting or fore-bay reservoirs used in connection therewith, the transmission line delivering power therefrom, any other miscellaneous structures used in connection with said unit or any part thereof, and all lands the occupancy and use of which are necessary or appropriate in the development of power in said unit.

“Project works” means the physical structures of a power project.

“Operation period” means the period covered by final permit subsequent to the actual beginning of operation.

“Survey-construction period” means the period covered by preliminary and final permits prior to the operation period.

“Load factor” means the ratio of average power output to maximum power output.

“Total capacity of the power site” means the net power estimated to be available for transmission, and is determined as the continued product of (1) the factor 0.08¹; (2) the average effective head, in feet; (3) the stream flow estimated to be available at the intake (in second-feet and in amount not to exceed the maximum hydraulic capacity of the project works); and (4) a factor, not less than the

¹ The factor 0.08 represents the horsepower at 70 per cent efficiency of a second-foot of water falling through a head of 1 foot.

average load factor of the power system, representing the degree of practicable utilization of the stream flow estimated to be available, and based on the extent of practicable fore-bay storage and the load factor of the power system.

"Rental capacity of the power site" means the capacity on which the rental charges are based, and is determined by making a deduction from the total capacity of the power site which, in per cent, shall be the product of the square of the distance of primary transmission in miles and the factor 0.001, but in no case shall such deduction exceed 25 per cent.

REG. 8. The occupancy and use of Interior Department lands (otherwise than by transmission lines) under a preliminary or final power permit for power sites of more than 100 horsepower total capacity (except permits exclusively for municipal purposes, for irrigation, or for temporary construction of project works as in this regulation hereafter specified) will be conditioned on the payment in advance for each calendar year of a rental charge calculated from the "rental capacity of the power site," as defined in regulation 7, at not less than the following rates per horsepower per year:

For the unexpired portion of the calendar year and for the first full calendar year of the survey-construction period, and similarly for the operation period	\$0.01
For the second full calendar year of each of said periods	.02
For the third year	.03
For the fourth year	.04
For the fifth year	.05
For the sixth year	.06
For the seventh year	.07
For the eighth year	.08
For the ninth year	.09
For the tenth and each succeeding year	.10

The rental charge will ordinarily be calculated at the following rates per horsepower per year unless good cause for fixing different rates appears:

For the unexpired portion of the calendar year and for the first full calendar year of the survey-construction period, and similarly for the operation period	\$0.10
For the second full calendar year of each of said periods	.20
For the third year	.30
For the fourth year	.40
For the fifth year	.50
For the sixth year	.60
For the seventh year	.70
For the eighth year	.80
For the ninth year	.90
For the tenth and each succeeding year	1.00

The occupancy and use of Interior Department lands by transmission lines will be conditioned on the payment in advance for each

calendar year of a rental charge to be fixed by the Secretary and specified in each permit according to the circumstances in each case.

The rental charges on account of a preliminary power permit will be calculated from the rental capacity of the power site as estimated by the Secretary at the time of granting such permit. The rental charges on account of a final power permit will be calculated from the rental capacity of the power site as estimated by the Secretary at the time of granting said final permit, provided that said estimated rental capacity may be adjusted by the Secretary annually to provide for changes in length of primary transmission and for increase or decrease, by storage or otherwise, of available stream flow to an amount of 10 per cent or more.

The first payment by every permittee shall be the charge for a full year, but any excess of said payment over the pro rata charge for the unexpired portion of the calendar year in which the permit is issued will be credited to the permittee as a part of his payment for the first full calendar year.

All payments made for the survey-construction period will be credited to the permittee for the cancellation of charges as they become due in the operation period.

No rental charge will be made for the occupancy and use of Interior Department lands under a preliminary or final power permit authorizing such occupancy and use exclusively for municipal purposes, for irrigation, or for the temporary development of power to be used in the construction of permanent project works under permit issued to the same permittee. All free permits issued under this paragraph will be subject to such special conditions as the Secretary may deem necessary in each case to fully protect the consumers of power for such municipal purposes and irrigation.

If all or any part of the amounts due for rental charges as required in the preliminary permit shall, after due notice has been given, be in arrears for 60 days, then and thereupon the preliminary permit shall terminate and be void and will be formally revoked by the Secretary. If all or any part of the amounts due for rental charges, as required in the final permit, shall, after due notice has been given, be in arrears for six months, then and thereupon the final permit shall terminate and be void and will be formally revoked by the Secretary.

At any time not less than 10 years after the issuance of final permit or after the last revision of rates of rental charge thereunder, the Secretary may review such rates and impose such new rates as he may decide to be reasonable and proper: *Provided*, that such rates shall not be so increased as to reduce the margin of income from the project over estimated and proper expenses (including reasonable allowance for repairs and renewals) to an amount which, in view of all the cir-

cumstances (including fair promotion costs and working capital) and risks of the enterprise (including obsolescence), is unreasonably small; but the burden of proving such unreasonableness shall rest upon the permittee.

The decision of the Secretary shall be final as to all matters of fact upon which the calculation of the charges depends.

REG. 9. All applications for power permits, whether preliminary or final, to occupy and use Interior Department lands under these regulations shall, if the applicant be an individual, be accompanied by an affidavit by the applicant that he is a citizen of the United States. If he is not a native-born citizen he must submit the usual proofs of naturalization. If the applicant is an association of citizens, each member must make affidavit of citizenship, and a complete list of the members must be given in an affidavit by one of them. Associations must, in addition, submit their articles of association; if there be none, the fact must be stated over the signature of each member of the association. Applications by individuals or associations must also be accompanied by the information called for in paragraph (G) of this regulation.

If the applicant is an incorporated company its application must be accompanied by the papers below in this regulation specified:

(A) A copy of its articles of incorporation, duly certified to by the proper officers of the company under its corporate seal, or by the secretary of the State where organized.

(B) A copy of the State law under which the company was organized (if it was organized under State law), with certificate of the governor or secretary of the State, under seal, that the same was the law at the date of incorporation. (See paragraph (H) of this regulation.)

(C) If the State law directs that the articles of incorporation or other papers connected with the organization be filed with any State officer, there must be submitted the certificate of such officer that the same have been filed according to law, and giving the date of the filing thereof.

(D) When a company is operating in a State other than that in which it is incorporated, it must submit the certificate of the proper officer of the State that it has complied with the laws of that State governing foreign corporations to the extent required to entitle the company to operate in such State.

(E) An official statement, by the proper officer, under the seal of the company, that the organization has been completed, that the company is fully authorized to proceed with construction according to the existing law of the State in which it is incorporated, and that the copy of the articles filed is true and correct.

(F) A true list, signed by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the items by this regulation required.

(G) A copy of the State laws governing water rights with the certificate of the governor or secretary of the State that the same is the existing law.

(H) If certified copies of the existing laws regarding corporations and irrigation, and of new laws as passed from time to time, be forwarded to the General Land Office by the governor or secretary of the State, the applicant may file, in lieu of the requirements of paragraphs (B) and (G) of this regulation, a certificate of the governor or secretary of state, under seal, that no change has been made since a given date, not later than that of the laws last aforesaid.

REG. 10. All applications for preliminary permits to occupy and use Interior Department lands for the purpose of securing the data required for an application for final permit for power projects of more than 100 horsepower total capacity shall consist of the following items (in addition to those specified in regulation 9), each of which shall be dated and signed by the applicant:

(I) An application in quadruplicate, on a form to be prescribed by the Secretary.

(J) A map on tracing linen, and either one Van Dyke negative or three print copies, cut to a uniform size and not larger than 28 by 40 inches and not smaller than 24 by 36 inches, with scale so selected as to show upon a single map the power project or projects applied for, showing the approximate location of the dams, reservoirs, conduits, power houses, and other project works. The map shall show: For each reservoir site, the distance and bearing of one extremity of the dam from the nearest existing corner of the public survey and approximately the position of the maximum flow line; and for each water-conduit line, the distance and bearing of each terminus from the nearest existing corner of the public survey and the approximate location of the conduit. If on unsurveyed land, the distances and bearings may be taken from a permanent mark on some natural object or permanent monument that can be readily found and recognized.

(K) Estimates in quadruplicate for each power project of (1) the total average effective head to be utilized, and the per cent thereof to be obtained from dam and from water conduit, respectively; (2) the stream flow, and the per cent thereof to be made available from storage by the project works and by other works, respectively; (3) the area to be flooded by back water from the diversion dam; (4) the length of the proposed water conduit (from intake to tailrace outlet); (5) the area and available capacity of each proposed storage reser-

voir; (6) the probable load factor of the power system; and (7) the distance, in miles, of proposed primary transmission.

These estimates should be accompanied by complete statements in detail of all data on which they are based, including stream measurements, rainfall, stream flow and evaporation records, drainage areas, probable points of delivery of power, and any other pertinent information.

(L) A duly certified copy of such notice or application, if any, as is required to be posted or filed, or both, to initiate the appropriation of water under the local laws. This notice or application should provide for use, by the applicant for a power permit or by his predecessors, of sufficient water for the full operation of the project works.

Application must be made for the occupancy and use of such lands for a definite, limited period only, which period will allow a reasonable time for the preparation and filing of the final application as prescribed in regulation 11. The time prescribed in the preliminary permit may upon application be extended by the Secretary if the completion of the final application has been prevented by unusual climatic conditions that could not reasonably have been foreseen or by some special or peculiar cause beyond the control of the permittee.

An application for a preliminary power permit shall not be complete until every map or paper required by regulation 9 and by this regulation shall have been filed in the form prescribed.

REG. 11. All applications for final permits to occupy and use Interior Department lands for power projects of more than 100 horsepower total capacity shall consist of the following items (in addition to those specified in regulation 9) :

(I) An application in quadruplicate in a form to be prescribed by the Secretary.

(J) Maps of location and plans of structures on tracing linen with either one Van Dyke negative or three print copies cut to uniform size not larger than 28 by 40 inches and not smaller than 24 by 36 inches with graphical scale not less than 6 inches in length drawn thereon. Separate sheets shall be used for maps of location whenever the whole survey can not be shown upon a single sheet. Each separate sheet of maps and plans shall contain an affidavit of the applicant's engineer and a certificate of the applicant in form to be prescribed by the Secretary. The maps shall show reference lines to initial points of survey, to termini of water conduits, to termini of transmission lines (when within 2 miles of Interior Department lands, measured along the proposed right of way), and to intersections of surveys with boundaries of national forests and other reservations of the United States; all lines of public-land subdivisions by official survey; and the status as to ownership of all lands of the

power project or projects, designating separately lands patented, lands of the United States entered or otherwise embraced in any unperfected claim under the public-land laws, unreserved lands of the United States, and, separately for each reservation, lands included within national forests and other reservations of the United States. Elevations and contour lines shall be based on United States Geological Survey datum whenever available.

(1) The following maps and plans shall be submitted for each reservoir that will be a part of the power project or projects applied for: (a) A contour map of each reservoir site, dam, and dam site on a scale of not more than 400 feet to the inch, with a contour interval of not more than 10 feet. The contour map for each reservoir site shall show the high-water flow line and, in case the reservoir is to be used in whole or in part for diversion purposes, the flow line fixed by the estimated average effective head, and also a table of areas and capacities for each flow line and each contour line. (b) A cross section of each dam site along the center line of the proposed dam, with a graphical log properly located thereon of each boring, test pit, or other exploration, and a brief statement of the character and dip of underlying material. (c) Plans, elevations, and cross sections of the dams, showing spillways, sluiceways, or sluice pipes, and other outlet works; and also a statement of the volume of the dam, the character of the materials used, and the type of construction.

(2) The following maps and plans shall be submitted for the entire length of each water conduit, from intake to tailrace outlet, that will be a part of the power project or projects applied for: (a) A contour map of the entire water-conduit location, except pipe lines and tunnels, on a scale of not more than 400 feet to the inch, with contour interval of not more than 10 feet and a profile of the pipe lines and tunnels. The contours shall cover either an area of 100 feet in width on each side of the center line of the water conduit or a difference in elevation of at least 25 feet above and below the grade line of the conduit. This map shall show the transit line of the survey and the center line of the proposed final location of the water conduit, including curves between tangents, and the distance from the nearest section or quarter-section corner of the intersection of the transit line with section lines. If such corners can not be found within a half mile of the line, the fact should be noted upon the map and the tie may be omitted. This map shall also show what sections of the water conduit will be in flume, ditch, tunnel, pipe, etc., and the grade of each section. (b) Plans, elevations, and cross sections of each type of water conduit, showing material, dimensions, grades, flow line, and capacity and plans and elevations of intake works and forebays.

(3) A contour map on a scale of not more than 50 feet to the inch, with a contour interval of not more than 5 feet, showing the proposed location of the power house, other buildings, etc., shall be filed for each power-house site that will be a part of the power project or projects applied for. This map shall also state the proposed type and estimated number and rated capacity of the water wheels and generators to be used.

(4) A map of the survey of the proposed final location of the center line of the transmission line, on a scale of not more than 1,000 feet to the inch, shall be filed for such portions of transmission lines as are located upon Interior Department lands and a similar map, on a scale such that the entire survey shall be shown on a single sheet, shall be filed for the entire primary transmission system.

(K) Copies of field notes in triplicate of the entire final location survey of water conduits and transmission lines and the exterior boundaries of power-house and reservoir sites, bearing an affidavit of the applicant's engineer and a certificate of the applicant in form to be prescribed by the Secretary.

(L) Estimates in quadruplicate for each power project of (1) the total average effective head to be utilized and the per cent thereof to be obtained from dam and from water conduit, respectively; (2) the stream flow and the per cent thereof made available from storage by the project works and by other works, respectively; (3) the area to be flooded by the dam below the flow line fixed by the estimated average effective head; (4) the length of the proposed water conduit (from intake to tail-race outlet); (5) the area and available capacity of each proposed storage reservoir; (6) the available storage capacity of forebay (or diversion pond); (7) the probable load factor of the power system; and (8) the distance, in miles, of primary transmission.

These estimates should be accompanied by complete statements in detail of all data on which they are based, including stream measurements, rainfall, stream flow, and evaporation records, drainage areas, total static head and losses in head, probable maximum, minimum, and average power output, load curves of the power system, efficiencies of machinery, probable points of delivery of power, and all other pertinent information.

(M) Such evidence of water appropriation as is specified in regulation 10 (L). If such evidence has been filed with an application for a preliminary permit, only such additional evidence will be required as will cover appropriations or transfers subsequent to the date of the evidence filed with the application for preliminary permit.

(N) A detailed statement in quadruplicate by the applicant of the time desired for making financial arrangements, for completing pre-

liminary construction, and for beginning "construction of the project works," as defined in regulation 15 (B).

Maps and field notes shall designate by termini and length each water-conduit and transmission line, and by initial point and area each reservoir and power-house site. The termini of water conduits, the termini of transmission lines, and the intersections with boundaries of reservations of the United States, and the initial point of survey of power-house sites shall be fixed by reference by course and distance to the nearest existing corner of the public survey; and the initial point of the survey of reservoir sites shall be fixed by reference by course and distance to the nearest existing corner outside of the reservoir by a line or lines not crossing an area that will be covered with water when the reservoir is in use. When any such terminus, intersection, or initial point is upon unsurveyed land, it shall be connected by traverse with an established corner of the public survey, and the distance from the terminus, intersection, or initial point to the corner shall be computed and noted on the map and in the affidavit of the applicant's engineer. When the nearest established corner of the public survey is more than 2 miles distant, this connection may be with a permanent mark on a natural object or a permanent monument which can be readily found and recognized. The field notes shall give an accurate description of the natural object or monument and full data of traverse as required above.

Each separate original map, plan, set of field notes, estimates, and data, evidence of water appropriation, articles of incorporation, and evidence of right to operate within any State shall be plainly marked "Exhibit A," "Exhibit B," etc., respectively, and referred to by such designation in the application. Maps and plans shall in addition be described in the application by their titles as "Exhibit A, map of location of," etc., "Exhibit B, plan of," etc. Duplicate and triplicate copies, etc., should be marked "Exhibit A, duplicate," "Exhibit A, triplicate," etc. Maps should be rolled for mailing and should not be folded.

An application for final permit shall not be complete until every map or paper required by this regulation has been filed in the form prescribed.

REG. 12. No applications will be received for preliminary permits for the occupancy and use of Interior Department lands for power projects of 100 horsepower total capacity or less. Applications for final permits for such occupancy and use shall be in writing, dated and signed by the applicant, and, in addition to the items specified in regulation 9, shall be accompanied by:

(J) A map in quadruplicate showing the location of dams, reservoirs, conduits, power houses, and transmission lines or other works.

(K) Field notes of the survey in quadruplicate.

(L) A statement in quadruplicate of the amount of water to be diverted for use, the maximum capacity of the diversion works, and the total average static and effective heads to be utilized.

(M) Such evidence of water appropriation as is specified in regulation 10 (L).

The map shall consist of one original on tracing linen and either one Van Dyke negative or three print copies, and shall not be larger than 28 by 40 inches or smaller than 24 by 36 inches, and may be on any convenient scale. The map shall show the status as to ownership of all lands in the power project, designating separately lands patented, lands of the United States entered or otherwise embraced in any unperfected claim under the public-land laws, unreserved lands of the United States, and, separately for each reservation, lands included in national forests and other reservations of the United States. The map shall also show: For each reservoir site, the distance and bearing of the initial point of survey from the nearest existing corner of the public survey, the location of the maximum-flow line, and the area and available storage capacity of the reservoir; for each water-conduit line, the distance and bearing of each terminus from the nearest corner of the public survey, the location of the center line of the conduit, and its length; and for each power-house site, the distance and bearing of the initial point of survey from the nearest corner of the public survey, the location of the exterior boundaries of the site, and the area. If on unsurveyed land, the distances and bearings may, if the nearest existing corner of the public survey is more than 2 miles distant, be taken from a permanent mark on some natural object or permanent monument that can be readily found and recognized.

REG. 13. When a preliminary or final application for the use of Interior Department lands only is submitted to a local land office the register will note thereon the date when the same was submitted over his written signature. Notations will also be made on the records of the local land office of the fact of such submission as to each unpatented tract affected, giving the date of submission and the name of the applicant. When the application affects lands in more than one district the register of the land office to which is submitted only a print copy of the map will make notations in like manner. All the application papers will then be promptly transmitted to the General Land Office with report that the required notations have been made on the records of the local land office, but no valid right will be affected unless and until the application papers are complete. If no unpatented land in the district is involved in the application the local officers will reject it, allowing the usual right of appeal.

Upon receipt of the papers the General Land Office will examine the same and determine whether that portion thereof required by regulation 9 is complete. If not, the commissioner will call upon the applicant, through the local land office, to supply the deficiency. When such portion of the papers is found by the General Land Office to be complete that office will promptly transmit all the application papers to the Director of the Geological Survey for consideration and action, stating the fact and date of such completion. The commissioner will make notation of the pendency of the application upon the records of the General Land Office. Upon receipt of the papers by the Geological Survey that office will determine whether the papers, other than those required by regulation 9 are complete. If not, that office will call upon the applicant to supply the deficiency. When the papers are found by the Geological Survey to be complete, that office will promptly notify the General Land Office of that fact, stating the date when all deficiencies were supplied by the submission of the necessary papers. The General Land Office will notify the local land office and the fact and date of such completion shall be noted on the records of the general and local land offices. Said date of completion will be taken as the date of initiation of priority as defined in regulation 3 and as the date of initiation of valid rights of the applicant as against other claimants.

When copies of preliminary or final applications for the use of national-forest lands and Interior Department lands are submitted to a local land office, the same procedure will be followed, except that the papers will be held in the local land office until notice is received from the Department of Agriculture of the fact and date of the submission to that department of the original of said papers. The date so notified shall be taken to be the date of submission to the local land office, and notation on the papers and on the records of the local land office shall be made accordingly. In case the papers are found to be incomplete by the General Land Office or the Geological Survey the office so finding shall mail to the Department of Agriculture a copy of the letter calling upon the applicant to supply the deficiency.

REG. 14. Before a final power permit will be issued for a power project of 100 horsepower total capacity or less, the permittee shall execute or file an agreement which, upon its approval in writing by the Secretary, shall constitute and express the conditions of the permit. Such agreement shall expressly bind the applicant to such of the items enumerated in regulation 15 and other such conditions as may be required by the Secretary.

REG. 15. Before a final power permit will be issued for a power project of more than 100 horsepower total capacity, the permittee shall execute and file an agreement which, upon its approval in writ-

ing by the Secretary, shall constitute and express the conditions of the permit. Such agreement shall expressly bind the applicant—

(A) To construct the project works on the location shown upon and in accordance with the maps and plans submitted with the final application for permit, and to make no material deviation from said location unless and until maps and plans showing such deviation shall have been submitted and approved. (See regulation 17.)

(B) To begin the construction of the project works, or the several parts thereof, within a specified period or periods from the date of execution of the permit, and thereafter to diligently and continuously prosecute such construction unless temporarily interrupted by climatic conditions or by some special or peculiar cause beyond the control of the permittee. The term "construction of the project works" as used in this regulation shall be deemed and taken to mean only the actual construction of dams, water conduits, power houses, transmission lines, or some permanent structure necessary to the operation of the completed power project, and shall not include surveys or the building of roads and trails, or the clearing of reservoir sites or other lands to be occupied, or the performance of any work preliminary to the actual construction of the permanent project works.

(C) To complete the construction and begin the operation of the project works, or the several parts thereof, within a specified period or periods from the date of execution of the permit.

(D) To operate the project works continuously for the development, transmission, and use of power, unless upon a full and satisfactory showing that such operation is prevented by unavoidable accidents or contingencies this requirement is temporarily waived by the written consent of the Secretary.

(E) That any approval of any alteration or amendment, or of any map or plan, or of any extension of time, shall affect only the portions specifically covered by such approval; and that no approval of any such alteration, amendment, or extension shall operate to alter or amend, or in any way whatsoever be a waiver of any other part, condition, or provision of the permit.

(F) To pay annually, in advance, such rental charges as may be fixed and required by the Secretary under these regulations. (Regulation 8.)

(G) To install at such places and maintain in good operating condition in such manner as shall be approved by the Secretary accurate meters, measuring weirs, gauges, or other devices approved by the Secretary and adequate for the determination of the amount of electric energy generated by the project works and of the flow of the stream or streams from which the water is to be diverted for

the operation of the project works and of the amount of water used in the operation of the project works and of the amounts of water held in and drawn from storage; to keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Secretary; and to make a return during January of each year, under oath, of such of the records of measurements for the year ended on December 31, preceding, made by or in the possession of the permittee, as may be required by the Secretary.

(H) That the books and records of the permittee shall be open at all times to the inspection and examination of the Secretary, or other officer or agent of the United States duly authorized to make such inspection and examination.

(I) That the works to be constructed, maintained, and operated under the permit will not be owned, leased, trusteeed, possessed, or controlled by any device or in any manner so that they form part of, or in any way effect, any combination in the form of an unlawful trust, or form the subject of any unlawful contract or conspiracy to limit the output of electric energy, or in restraint of trade with foreign nations or between two or more States, or within any one State in the generation, sale, or distribution of electric energy.

(J) To protect all Government and other telephone, telegraph, and power transmission lines at crossings of and at all places of proximity to the permittee's transmission line, in a workmanlike manner according to the usual standards of safety for construction, operation, and maintenance in such cases, and to maintain transmission lines in such manner as not to menace life or property.

(K) To clear and keep clear the Interior Department lands along the transmission line for such width and in such manner as the officer of the United States having supervision of such lands may direct.

(L) To dispose of all brush, refuse, or unused timber on Interior Department lands resulting from the construction and maintenance of the project works to the satisfaction of the officer last aforesaid.

(M) To build and repair such roads and trails as may be destroyed or injured by construction work or flooding under the permit, and to build and maintain necessary and suitable crossings for all roads and trails that intersect the water-conduit constructed, maintained, or operated under the permit.

(N) To pay the full value as fixed by the Secretary for all timber cut, injured, or destroyed on Interior Department lands in the construction, maintenance, and operation of the project works.

(O) To pay the United States full value for all damage to the lands or other property of the United States resulting from the breaking of or the overflowing, leaking, or seeping of water from the project works, and for all other damage to the lands or other property of the United States caused by the neglect of the permittee or of the employees, contractors, or employees of the contractors of the permittee.

(P) To sell power to the United States, when requested, at as low a rate as is given to any other purchaser for a like use at the same time, and under similar conditions, if the permittee can furnish the same to the United States without diminishing the quantity of power sold before such request to any other customer by a binding contract of sale: *Provided*, That nothing in this clause shall be construed to require the permittee to increase permanent works or install additional generating machinery.

(Q) To do everything reasonably within the power of the permittee both independently and on request of the Secretary or other duly authorized officer or agent of the United States to prevent and suppress fires on or near the lands to be occupied under the permit.

(R) To maintain a system of accounting of the entire power business in such form as the Secretary may prescribe, which system as far as is practicable will be uniform for all permittees, and to render annually such reports of the power business as the Secretary may direct: *Provided, however*, That if the laws of the State in which the power business or any part thereof is transacted require periodical reports from public utility corporations under a uniform system of accounting, copies of such reports so made will be accepted as fulfilling the requirements of this clause.

(S) To indemnify the United States against any liability for damages to life or property arising from the occupancy or use of Interior Department lands by the permittee.

(T) To abide by such reasonable regulation of the service rendered and to be rendered by the permittee to consumers of power furnished or transmitted by the permittee, and of rates of payment therefor as may from time to time be prescribed by the State or any designated agency of the State in which the service is rendered.

(U) To perform such other specified conditions with respect to the occupancy and use of lands within any of said parks or any military, Indian, or other reservation as may be found by the chief officer of the department under whose supervision such park or reservation falls to be necessary as conditions precedent to the issuance of the permit in order to render the same compatible with the public interest.

(V) Upon demand therefor in writing from the Secretary to surrender the permit to the United States or transfer the same to such State or municipal corporation as the Secretary may designate, and on the conditions specified in this paragraph; also to give, grant, bargain, sell, and transfer with the permit (upon such demand and on said conditions) all works, equipment, structures, and property then owned, leased, or held and then valuable or serviceable in the generation and transmission of electrical power, including the trans-

mission system from generating plant to initial point of distribution, and which are then dependent, in whole or in part, for their usefulness upon the continuance of the permit. The Secretary may require such surrender if the United States shall desire to take over the permit and works, or he may designate as such transferee any State or municipal corporation which shall so desire. But such surrender or transfer shall be on condition precedent that the United States or such transferee shall first pay to the permittee the reasonable value of all said works, equipment, structures, and property, and in addition thereto a bonus equal to three-fourths of 1 per cent of such reasonable value for each full year of the unexpired term of the permit. Such reasonable value shall not include any sum for any properties or values whatsoever not specifically mentioned in this paragraph, and shall be determined by mutual agreement between the parties in interest, and in case they can not agree, by the Secretary. The reasonable value, for the purposes of this regulation, of such works, equipment, and structures shall be the cost of replacing them by other and new works, equipment, and structures capable of developing and transmitting the same amount of merchantable power with equal efficiency, less a per cent thereof equal to the per cent of depreciation in value and obsolescence of the existing works, equipment, and structures.

REG. 16. The permit will be prepared in duplicate by the Geological Survey for execution by the permittee and approval by the Secretary. After approval it will be returned to the Geological Survey for the filing of one copy. The other copy will be transmitted to the permittee by the Geological Survey through the General Land Office and the local land office. These offices will, respectively, note the approval upon their records.

REG. 17. During the progress of construction amendments to maps of location or plans of structures will be required from the permittee if there is a material deviation from the maps or plans as originally filed, but no amendment will be allowed that is incompatible with the occupancy and use of lands under existing permits or pending applications. Any approval of an amendment of a map or plan or of any extension of time shall be in the form of a supplemental agreement and permit so drawn as to become a part of the original agreement and permit and a substitute for the clauses amended. Any approval of any amendment of any map or plan shall apply only to the portions specifically covered by such approval, and no approval of any such amendment shall operate to amend or be in any way a waiver of any other part, condition, or provision of the permit.

If, after the completion of the project works, there are any deviations in location from those shown upon the original map or approved amendments thereof, additional maps prepared in the manner pre-

scribed for original maps of location will be required to be filed within six months after the completion of the project works, showing the extent of such deviations and the final locations of such project works. Also upon the completion of the project works detailed working plans will be required of the works as constructed, except such parts as have been constructed in compliance with plans originally filed or approved amendments thereof. Such new or additional plans may be originals on tracing linen or Van Dyke negatives of the permittee's own working plans. The plans of conduits, dams, and appurtenant structures must be complete; of power houses, only general layout plans are required.

REG. 18. An extension of the periods stipulated in the permit for beginning construction and the beginning of operation will be granted only by the written approval of the Secretary after a showing by the permittee satisfactory to the Secretary that the beginning or completion of construction and beginning of operation has been prevented by engineering difficulties that could not reasonably have been foreseen, or by other special and peculiar causes beyond the control of the permittee.

REG. 19. A final permit may be transferred to a new permittee under the following conditions and not otherwise: The proposed transferee shall file with the Director of the Geological Survey, Washington, D. C., the decree, execution of judgment, will, proposed contract of sale, or other written instrument upon which the proposed transfer is based, or a properly certified copy thereof, also an application by the proposed transferee in the form of an agreement binding the proposed transferee to the performance of such new and additional conditions expressed therein as the Secretary may deem necessary; and thereupon the Secretary may, in his discretion, approve in writing the proposed transfer, and after such approval the transferee shall succeed to all the rights and obligations of the permittee, subject, however, to such new and additional conditions as shall have been embodied in such agreement and so approved.

REG. 20. If any person shall make a false engineer's affidavit under these regulations the Secretary may order that no map, field notes, plan, or estimate made by such person shall be received or filed while the order is in force. If any person or corporation for himself or itself or as the attorney, agent, or employee of another, shall offer or file any map, field notes, plan, or estimate bearing a false engineer's affidavit, knowing the same to be false, the Secretary may order that no application for a power permit shall be filed by or received from the person or corporation so offending, either in his or its own behalf or as attorney, agent, or employee of another, and that no power permit shall be issued to such person or corporation while the order is in force.

REG. 21. Violation by a final permittee of any of the provisions of these regulations, or of any of the conditions of a permit issued to him thereunder, shall be sufficient ground for revocation of such permit; but attention is called to the statute under which these regulations are issued, which provides:

That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or by his successor in his discretion.

REG. 22. Any power project under permit, or any part thereof, whether constructed or unconstructed, may be abandoned by the permittee upon the written approval of the Secretary after a finding by the Secretary that such abandonment will not tend to prevent the subsequent development of such project or part thereof so abandoned, and after the fulfillment by the permittee of all the obligations under the permit, in respect to payment or otherwise, existing at the time of such approval. Upon such abandonment, after such approval thereof and fulfillment of existing obligations, so much of the agreement and permit as relates to the abandoned project or part of a project will be formally revoked by the Secretary.

Approved August 24, 1912.

WALTER L. FISHER,
Secretary.

CONTESTS OF LANDS WITHDRAWN UNDER RECLAMATION ACT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, August 24, 1912.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Through contests, and otherwise, my attention has been repeatedly directed to the regulations of January 19, 1909 (37 L. D., 365), wherein the provisions of paragraphs six and seven of the regulations concerning lands withdrawn under the reclamation act of June 17, 1902 (32 Stat., 388), approved June 6, 1905 (33 L. D., 607), were amended to read as follows:

6th. No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto*, terminate all right that was acquired by reason of such contest.

7th. Any entry of land embraced within the area of a second form withdrawal may be contested and, if at the date of entry by the successful contestant, the land is under second form withdrawal, his entry will be subject to the limitations and conditions of the reclamation act.

After a most careful consideration of the matter I am of opinion that the change made by the circular of January 19, 1909, is detrimental to public interests, believing that contests should be permitted of all claims whether within a first form reclamation withdrawal or elsewhere, upon a sufficient charge, which, if proven, would avoid the claim or cause its cancellation. The regulations of January 19, 1909, are therefore revoked and paragraphs six and seven of the regulations of June 6, 1905, *supra*, are reaffirmed or restored with the following modification as to paragraph 6:

Sixth. An entry embracing lands included within a withdrawal, made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest will be awarded a preferred right of making entry. Should the land embraced in the contested entry be within a first form withdrawal at time of successful termination of the contest the preferred right may prove futile for it can not be exercised as long as the land remains so withdrawn: should it be within a second form withdrawal, however, he (the contestant) may make entry under the terms of the reclamation act and should it, at that time, be excluded from all forms of withdrawal he may enter as in other cases made and provided. It should be the duty, however, of such contestant to keep the local officers advised respecting his residence to which notice may be sent him of his preference right of entry in event of successful contest, and a notice mailed to his address, shown by the records of the local land office at the time of the mailing of the notice of preference right, will be held to meet the requirements of the act of May 14, 1880 (21 Stat., 140).

I understand that the cause assigned for denying the right of contest in the regulations of 1909 was the fact that, to a great degree, the contestant, although successful in his contest, was unable to realize thereon because of the need of the lands for governmental use; and, further, that in instances where the lands were not desired for governmental use their restoration, occurring at a date so far distant from the successful termination of the contest, led to confusion because of overlooking the outstanding preference right at the time of the opening of the land to entry, and at the time of entry of the lands by another.

With respect to the lands that are desired for governmental use, the contestant brings his contest with the knowledge that it may be futile because of that contingency, and while there is, of course, danger of overlooking any postponed right, it seems to me that by appropriate notation upon the records, particularly the plats of the local land office where the land is disposed of, certainly when other application is filed therefor, and if appropriate notice has not already been issued to the contestant it should then be given and no other disposition made of the lands pending the period of preference right accorded by the statute.

Your future action respecting contests will be governed accordingly. So instruct the local officers.

Very respectfully,

SAMUEL ADAMS,
First Assistant Secretary.

FOWLER v. DENNIS.

Decided August 28, 1912.

SIMULTANEOUS SETTLEMENTS—DIVISION OF LAND.

The rule that protects a settler upon one subdivision of a quarter-section against encroachment by others upon any portion of that quarter-section, based upon the doctrine of notice imparted by the settlement, has no application where two persons made simultaneous settlements upon the same quarter-section at the time of the opening of the land at midnight; but in such case the land may be divided between the parties.

CONFLICTING DECISION OVERRULED.

Sumner v. Roberts, 23 L. D., 201, overruled, in so far as in conflict.

ADAMS, *First Assistant Secretary*:

On May 3, 1912, the Department affirmed the concurring decisions of the local officers and of the Commissioner of the General Land Office, which held, in effect, that Harold R. Fowler and Thomas Dennis simultaneously settled upon the NW. $\frac{1}{4}$, Sec. 29, T. 96 N., R. 67 W., Gregory, South Dakota, land district, Fowler near the southwest and Dennis near the northwest corner thereof, immediately after midnight of September 30, 1909; that both had since maintained residence thereon in good faith and that, since the rights of Fowler were not superior to those of Dennis, Dennis's entry for said land should not be disturbed.

Fowler has applied for a rehearing, and in support of his motion urges that it is shown by the testimony that, although Dennis went upon the land immediately after midnight of September 30, 1909, several minutes elapsed before he began the excavation for a foundation for his house, whereas Fowler began his excavation promptly after midnight of that day.

The testimony has been carefully reviewed, in connection with the pending motion, and the Department finds no reason for changing its conclusion that these parties settled upon the land in controversy simultaneously. John London, a witness for Dennis, when recalled to the stand, at the close of the hearing, to rebut certain testimony as to an alleged conversation, made the following statement:

He (one Langan) was helping his sister to make improvements on the quarter joining 29 on the west, that is, section 30, and after they got through with their improvements, he fetched the spade over and gave it to Mr. Dennis, who was standing on 29 waiting for the spade. We only had two spades in the crowd and he had the other.

But the above statement must be considered with the following, from the subsequent examination of this witness:

Q.—You have already stated . . . that you saw Mr. Dennis make his improvements?

A.—I seen him after Margaret Langan. I know Mr. Dennis started from the light wagon with the spade. It was a long handled spade.

Q.—The only digging you saw him do was after Margaret Langan got through on her quarter?

A.—Unless that he dug some before she started in.

Q.—You didn't see him do that?

A.—No, as the man said, I was pretty busy myself, just then.

The Department can find nothing in this testimony to sustain the contention made in the motion that Dennis did not begin to excavate for the foundation of a house immediately after midnight, as was testified by him and several witnesses. On the contrary, London's testimony, as a whole, is consistent with, if not confirmatory of, that of Dennis and the others.

The decision of May 3, 1912, was, as stated, based upon the finding that the rights of the parties were equal; such being the case, the Department refused to cancel the entry of Dennis in favor of Fowler, who had no better claim to the land. It appears that Fowler settled upon the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and Dennis upon the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, and while the legal right of each to the entire NW. $\frac{1}{4}$ is identical, it must be conceded that one who makes actual settlement, in good faith, upon a 40-acre subdivision of the public domain has an equitable right thereto superior to the claim of one who settled, at the same time, upon another legal subdivision, even though a part of the same technical quarter section, and relies upon the claim that a settlement extends to the entire quarter section. The rule that protects a settler upon one subdivision of a quarter section against encroachment by others, based upon the doctrine of notice imparted, can have no possible application to a case like this where the settlements were simultaneously made at midnight; and to give a party whose claim, as to three of four subdivisions, is dependent upon such notice, the home and improvements of his adversary, merely because of the allowance of the entry of the one and the denial of the application of the other, would be to disregard any settlement rights and give to a mere technicality and a negligible fact the controlling weight in a controversy where the equities of the parties should prevail. See *Carlson v. Kries* (6 L. D., 152).

Section 2274, Revised Statutes, provides for the adjustment of settlements by two or more persons, made prior to survey, on the same legal subdivision, but there is no specific statute to govern cases like the one under consideration. In *Sumner v. Roberts* (23 L. D., 201), involving surveyed land, it was held that a finding of simultaneous settlement by two parties upon the same technical quarter section did

not warrant a division of the land between them; but with the reasoning of this case the Department is unable to agree, preferring to follow the holding of the Supreme Court in *Williams v. United States* (138 U. S., 514, 524), where it was said:

It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the land department, matters not foreseen, equities not anticipated, and which are, therefore, not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

See also *Knight v. U. S. Land Association* (142 U. S., 161).

It appears from the testimony that after settlement upon the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said section 29, Dennis moved to the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and that his home and improvements are on the latter tract. In the judgment of the Department, a just disposition of this controversy may be effected by the award of the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ to Dennis and the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ to Fowler, and it is so ordered, subject to the right of the parties to agree, within thirty days from notice hereof, upon other settlement of their conflicting claims. The departmental decision of May 3, 1912, is modified in accordance herewith.

The case of *Sumner v. Roberts*, *supra*, and others of like import, are hereby overruled, in so far as they are in conflict herewith.

RULE 83, RELATING TO MOTIONS FOR REHEARING, AMENDED.

RULES OF PRACTICE.

DEPARTMENT OF THE INTERIOR,
Washington, August 29, 1912.

Rule 83 of the rules of practice in cases before the United States district land offices, General Land Office, and the Department of the Interior, approved December 9, 1910 (39 L. D., 395, 408), as amended November 16, 1911 (40 L. D., 299), is hereby amended to read as follows:

Rule 83. A motion for rehearing of a cause by the Secretary of the Interior, together with all papers used in connection therewith, must be in writing, and must, together with evidence of service thereof on the adverse party, be filed with the Secretary of the Interior within 30 days after service of notice of the decision in said cause.

Said motion must state concisely and specifically the grounds upon which such rehearing is asked and may be accompanied by written argument in support thereof. No matters other than those specified will be considered.

The adverse party will be allowed 15 days after the service of the motion upon him in which to serve and file with the Secretary of the Interior a reply to the motion.

In case no such motion be filed within the period above prescribed the record will at once be transmitted to the Commissioner of the General Land Office for

execution of the judgment of the Secretary. Like action will be taken immediately after the judgment of the Secretary on any motion for rehearing.

No oral argument will be allowed on any such motion, and this rule will be strictly adhered to. If the motion be granted, the Secretary will at once proceed to dispose of the case, or, in his discretion, if the motion, or the reply thereto, has been accompanied by a request for oral argument in the event of it being granted, will set the cause down for oral argument. In any case, however, if the motion be granted, the Secretary may set the cause down for oral argument.

Nothing in this rule, however, shall prevent any judgment or order of the Secretary on appeal from becoming effective, in whole or in part, immediately or at any other time when and as directed in the judgment or order.

Rule 83, as hereby amended, will take effect and be in full force on and after August 29, 1912.

Dated this 29th day of August, A. D., 1912.

SAMUEL ADAMS,
Acting Secretary.

ANDREW L. SCOFIELD ET AL.¹

Decided June 21, 1911.

COAL LAND LOCATIONS IN ALASKA.

Locations and entries of coal lands in the District of Alaska, in the names and ostensibly in the interest and for the benefit of individuals, but in reality for the common use and benefit of an association or combination of persons, the use of the names of the individuals being merely to effect a colorable compliance with the law, are illegal.

LOCATIONS UNDER ACT OF APRIL 28, 1904—LIMITATIONS.

Persons or associations of persons locating or entering coal lands in the District of Alaska under the act of April 28, 1904, amendatory of the act of June 6, 1900, are required to possess the qualifications of persons or associations making entry under the general provisions of the coal land laws of the United States, and are subject to the same restrictions and limitations.

ACTS DISPOSING OF PUBLIC LANDS STRICTLY CONSTRUED.

Acts of Congress granting portions of the public lands for any purpose, or providing for their disposition, should be strictly construed and the grant should not be enlarged by implication.

CONSTRUCTION OF AMENDED STATUTE.

As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had been so enacted at the beginning.

LOCATION BY ASSOCIATION—ACT OF APRIL 28, 1904.

While the amendatory act of April 28, 1904, is construed by the land department in connection with the coal land law of Alaska theretofore existing, yet if it be regarded as an entirely independent expression of the will of Congress, and as constituting all the law applicable to Alaska coal lands, its provisions will not justify a holding that an association of 33 persons is authorized to acquire 5,250 acres of public coal lands.

¹ See page 240.

PREFERENCE RIGHT—OPENING AND IMPROVING MINE.

A small amount of open-cut work, merely for prospecting purposes, does not meet the requirements of the coal land laws conferring a preference right of purchase upon one who opens and improves a coal mine upon the public domain.

COAL LAND LOCATION—DECLARATORY STATEMENT—ABANDONMENT.

One who makes a coal land location, files declaratory statement therefor, and without sufficient cause abandons the same, is thereby disqualified to make a second location and filing.

NOTICE OF LOCATION MUST BE FILED WITHIN ONE YEAR.

Under the provisions of the act of April 28, 1904, notice of location of coal lands in the District of Alaska must be filed in the recording district and the local land office within one year from date of location.

**DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, June 21, 1911.**

UNITED STATES <i>v.</i> ANDREW L. SCOFIELD, ET AL.	{	The Cunningham claims; coal entries 1 to 33, inclusive; Juneau, Alaska, series. Held for cancellation.
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REGISTER AND RECEIVER,

Juneau, Alaska.

GENTLEMEN: There are involved in this controversy 33 coal entries, each a fraction less than half a mile square, including slightly less than 160 acres each, or an aggregate area of 5,250 acres.

LOCATION—PHYSICAL CONDITIONS—ACCESSIBILITY.

The claims are located in the Kayak district of Alaska in the Controller Bay region. They form a part of what is known as the Bering River or Katalla coal fields. The center of the group is about 24 miles northeast of Katalla, a small port on Katalla Bay, and about an equal distance from the center of Kanak, an island about 4 miles long and 1 mile wide situated between Controller Bay and the Pacific Ocean, and about 20 miles from the point where the waters of Bering River are discharged into Controller Bay. The Bering River, a short stream, is fed principally by the waters of two creeks—Stillwater, which is about 1 mile southeast of the southwestern corner of the group where it leaves Lake Kushtaka, of which it is the outlet, and which runs southeast to its confluence with Bering River; and Canyon Creek, which rises north of the claims and flows in a southwesterly direction to its junction with the Bering River. Stillwater Creek flows into Bering River about 4 miles south of the center of the south line of the group. The claims are situated between parallel east and west lines and are contiguous and compact. The Kushtaka Glacier,

on the northwest, "pushes" eastward the claims on the north, while Canyon Creek "cuts" into them on the southeast with this result, that the claim on the southwest is 1 mile farther west than the claim on the northwest and the one on the southeast 1 mile farther west than the one on the northeast. North and south the claims extend 2 miles and east and west about twice that distance. The country between Katalla, Kanak, and the mouth of Bering River and the claims in question is low and marshy. The waters separating Kanak from the mainland are shallow and for a considerable distance the territory is described as a mud flat. On the drier grounds in this region there is a good growth of merchantable hemlock and spruce. The center of the south line of the southern tier of claims is in a region low and flat, with an elevation of less than 200 feet, but from this central point the south line both to the east and to the west crosses low ridges. The incline or trend of the surface from the south line northward is very abrupt, and the claims on the north tier have an average altitude of about 2,000 feet, and at places the elevation reaches 2,500 feet. Trout Creek, rising in the northwestern part of the group, flows almost due south through the claims to its junction with Stillwater Creek about a mile south of the south line. Clear Creek, having its source near the north line about a mile and a half west of the northeast corner of the group, flows in a southwesterly direction through the claims and empties into Stillwater Creek a short distance from the mouth of Trout Creek. The surface on the southwest dips toward Lake Kushtaka and on the east toward Canyon Creek. Steep hills or high ridges lie between Trout and Clear Creeks and between Clear and Carbon Creeks. Twelve of the claims are east of Clear Creek and two of them west of Trout Creek. Access to the claims is very difficult. They are reached from Katalla only in small boats and by trails that pass through marshes and almost impenetrable jungles. The harbor facilities at Katalla are so inadequate that boats of any considerable burden can not land there. Katalla is $67\frac{3}{4}$ miles from Cordova, as measured along the route of the proposed railroad, and 120 miles by water. It is by open sea about 1,100 miles from Seattle, about 1,500 miles from Portland, and between 1,800 and 2,000 miles from San Francisco. The Chugach National Forest, established by the President's proclamation of February 23, 1909, includes about two-thirds of the claims.

CONTIGUOUS AND NEAR-BY COAL CLAIMS.

Northeast and contiguous to these claims is the Chezum group of 11 claims; to the south and contiguous, a series of four claims known as the Wardell claims; to the east and separated by Canyon Creek is the Lippy-Davis group, northeast of which lies the large Green group; to the west and southwest, separated by Kushtaka Lake and

the Kushtaka Glacier, a nose of the great Martin River Glacier, at a distance of probably 2 miles, is the extensive English group, to the southwest of which are the Christopher and other small groups.

THE CHARGES.

The Government charged briefly: First, that the several locations, filings, and entries were made pursuant to an understanding and agreement entered into by all the claimants prior to location to combine the several claims for the joint use and benefit of all the claimants; second, that each location, filing, and entry was made with the unlawful purpose and intent that the titles acquired thereunder should inure to the use and benefit of an association or a corporation formed or to be formed by the several claimants; third, that no mine of coal was opened or improved on any of the several tracts located and entered.

Matters disclosed by the record concerning two of the entries and defects apparent upon the face of the papers affecting all of them are considered in their order.

THE PROCEDURE.

Notices of the charges above recited were accepted by the several entrymen through their attorneys duly authorized, and each defendant denied the several charges and requested that a hearing be ordered to determine the truth thereof. An investigation was directed, and to expedite the proceedings thereunder a special commissioner was appointed by the Acting Secretary of the Interior, on September 18, 1909, to take and hear the testimony. Under instructions issued by this office and approved by the Acting Secretary of the Interior, on November 3, 1909, the special commissioner theretofore designated was directed to enter upon an investigation of the charges preferred against these several claims, to administer an oath to any witness attending to testify or depose before him in the course of such investigation, and to permit the defendants to appear and be represented by counsel, to the end that the testimony so taken might by stipulation of the parties be considered by the Land Department in the disposition of the several cases upon their merits. A stipulation was accordingly entered into between the United States by its attorneys and agents and the several defendants by their attorneys, under which the cases were to be consolidated for hearing, with the provision that each case should be disposed of under the facts legally applicable thereto, that the testimony taken in the investigation might be considered by the Land Department as though the hearing had been ordered by and the testimony taken before the register and receiver of the Juneau land office, the defendants expressly waiving any right to a decision in the first instance by the register and receiver of the

Juneau land office and agreeing that the cause be disposed of by the Commissioner of the General Land Office as upon appeal from decisions of the register and receiver of the Juneau land office. It was further stipulated that the original papers, proofs, etc., pertaining to the several entries be received and considered in evidence. In conformity with the instructions and notices and the stipulations of counsel, the investigation of the several charges against the various entrymen was begun at Seattle, Wash., November 18, 1909. The Government and the several defendants were represented by attorneys and both the Government and the defendants announced readiness to proceed. Pursuant to authority given to the special commissioner and by consent of counsel representing the Government and the defendants, respectively, the investigation was adjourned from time to time and from place to place until April 2, 1910. The Government introduced documentary evidence and called a number of witnesses. The defendants called all of the 31 living entrymen and the transferee of a number of the claims, examined each of them in chief, and submitted each of them to the Government for cross-examination, and offered other testimony. E. C. Hughes, Esq., and John P. Gray, Esq., counsel for the claimants, submitted an elaborate brief in their behalf, reciting the facts and discussing the law applicable thereto; and on May 8 and 9, 1911, the above-named counsel appeared before this office and delivered exhaustive arguments in behalf of the claimants. At the request of said counsel, the Secretary of the Interior sat with the commissioner and heard the arguments.

THE FACTS.

During the spring of 1902 rumored discoveries of oil in the Controller Bay region of Alaska attracted the attention of Dr. John G. Cunningham, of Spokane, Wash., and F. C. Davidson, of Oakesdale, Wash., and they sent two prospectors there to investigate the alleged oil fields. These men returned during the early summer, reporting the location of a number of oil claims, and that there was a coal field in the vicinity thereof. Later in the summer one of them made a second trip to Alaska at the expense of Dr. Cunningham and Davidson and brought with him on his return samples of oil and also of coal. Cunningham and Davidson were so impressed with the reports that they induced Clarence Cunningham, a mining prospector and a brother of Dr. John G. Cunningham, to go to Alaska with one of the prospectors for the purpose of making additional examination as to the oil and coal possibilities. Clarence Cunningham visited Katalla in the fall of 1902 as the agent of his brother, Dr. John G. Cunningham, and F. C. Davidson, and examined both the coal and oil fields. He found what appeared to him an attractive coal proposition, the land being claimed by squatters. He did not believe the squatters had

any legal rights, but considered it the better policy to buy them out. He took samples of coal and entered into an arrangement with the squatters by which he was to pay them \$300 for each claim of 160 acres, provided analyses of the coal showed that it was of good quality.

The analyses of the coal proved that it was of superior quality; and, after reporting the results of his investigation to his principals and conferring with them and they agreeing to make locations, he actively proceeded to interest a number of his other friends to join with them in buying out the rights of the squatters and making coal locations. He succeeded in securing nine persons in addition to himself, each of whom contributed \$500 for the purpose of purchasing the rights of the squatters and toward defraying the expenses of location. These parties were former Gov. Miles C. Moore and his son, Walter B. Moore, of Walla Walla, Wash.; Fred C. Mason and J. G. Cunningham, of Spokane; F. C. Davidson and Michael Doneen, of Oakesdale; C. J. Smith, of Seattle; F. Cushing Moore (nephew of Miles C. Moore), O. D. Jones, and Clarence Cunningham, of Wallace, Idaho. No written contract was signed by the parties.

The matter, however, was discussed between Clarence Cunningham and each of his associates and some agreement was reached. Gov. Moore discussed the proposition with Baker, and that gentleman immediately sought the advice of counsel whether an agreement to combine coal claims in Alaska prior to location was lawful. Smith consented to make location upon condition that the expenses be borne mutually by a number of persons. F. Cushing Moore promised to donate one-eighth of his claim to Cunningham. Mason, drawn into it by his former partner, Peel, who was more familiar with the details than he, stated his understanding as follows:

Q. Now, did Mr. Peel and yourself consider just how you were going to make this money back on this claim?—A. Why, I think so.

Q. Well, now, just what was your idea on that point?—A. Well, it was considerably more Peel's account than it was mine. He was always inclined to go into these different ventures, and I, after consideration, thought that coal in Alaska might be of good value, especially as it was within a short distance of the ocean, and I realized that in order to develop coal mines it would take a large amount of capital, and, as I have stated in the affidavit I made to Mr. Jones, we all realized that in order to develop a property of that size that it would require a railroad and coal bunkers and tipples and an immense amount of expenditure, and the popular idea was we would likely do so that we could secure the titles and to be applied, to form a corporation and place an issue of bonds upon the entire proposition and retain control absolutely of it, we could dictate the prices and how we wanted to sell it, and certainly to put the proposition through it would be a matter which would require an immense capital and it would be some time before it could be done.

Q. Yes; and that was your idea and your understanding of the matter when you went into this coal matter?—A. Yes; it was.

Clarence Cunningham, the originator and promoter of the scheme and who for himself and as the agent of the others, was to carry

it into effect, described an agreement as having been entered into, and spread it of record in a journal purchased and kept for the purpose of preserving in record form an authentic account of the various transactions incident to the undertaking. The text of the agreement, as understood, reduced to writing and preserved by Cunningham, follows:

WALLACE, IDAHO, *February 1, 1903.*

Have options on several coal properties in Alaska, having examined and sampled same in October and November last, with the result that I have agreed to take up the options and am entering into verbal agreements with the subscribers and whose names will appear on the following pages, whereby each of said subscribers shall have one claim of 160 acres recorded in his name and will own same individually until such time as title can be secured for same. After this is done each subscriber agrees to deed his interest to a company to be formed for the purpose of developing and marketing said coal and receive stock in the said company in payment for same, but it is further agreed that each subscriber shall have one-eighth ($1/8$) of his stock issued to Clarence Cunningham in consideration of his services in securing said land. This one-eighth interest to be issued to the writer of these pages is to be exclusive of his own holdings, upon which he agrees to meet and make his payments in common with all others who enter into this agreement, and is understood to be one-eighth of the entire stock of the said company.

After entering into the agreement, Clarence Cunningham returned to Katalla early in the year, 1903, purchased the rights of the squatters on 22 claims, paying therefor \$6,600, and made coal locations for himself and his nine associates. He also made a location for Francis Jenkins of Moscow, Idaho, to whom he was indebted, and contributed a part of the money which he owed Jenkins toward this project. In addition to locating a claim for Jenkins without his authority, Clarence Cunningham made 11 other locations in the names of various friends and associates without consulting them with respect thereto. After making the 22 locations, 10 authorized and 12 unauthorized, Cunningham left Alaska and set out to interview the men whose names he had used and endeavored to secure their cooperation. A number of them among whom may be mentioned John A. Finch and A. B. Campbell of Spokane, Wash., acquiesced in the unauthorized use of their names and entered actively into the scheme; some refused to have anything to do with it and Cunningham sought and obtained the consent of other parties, whose names had not been used, to make locations, with this result, that in May, 1903, he had 23 claimants for 22 claims, or to use his language, "Twenty-two interests and twenty-three subscribers." Francis Jenkins of Moscow, Idaho; W. W. Baker of Walla Walla, Wash., Al Page of Wardner, Idaho; Arthur D. Jones, John A. Finch, A. B. Campbell, R. K. Neill, H. M. Davenport, I. N. Campbell, C. H. Moore, and F. C. Burbidge of Spokane, Wash.; and Henry and Hugh B. Wick of Youngstown, Ohio, joined with those theretofore associated during the month of May, 1903. With the exception of Francis Jenkins,

whose money Cunningham had used, these parties were not permitted to come in under the same terms as those originally associated, but each of them was required to pay the sum of \$500 that had been advanced by the early participants and \$250 additional save Baker, who paid \$100 additional; in other words, the later comers were required to contribute \$250 and Baker \$100 to the common fund.

During the month of June, Cunningham made an additional purchase, for which he paid \$2,850. From whom this land was bought does not appear, but, at the rate paid the original squatters on the 22 claims, the area thus secured embraced nine full and one half claims. In June, therefore, 23 locators were holding $31\frac{1}{2}$ claims; in other words, 23 subscribers at their common expense bought out the squatters and began the development of a field sufficiently large to include $31\frac{1}{2}$ interests.

During the latter part of August, 1903, Reginald K. Neill, a mining engineer then associated with Finch & Campbell, of Spokane, visited the coal fields and discussed with Cunningham the amount of compensation the latter was to receive. Cunningham apparently wanted a salary and a part interest in the other claims, or in addition to his salary that the other members "carry" his claim. To this Neill objected, using this language, "I said I would not go on if I had to pay him a salary and carry him besides."

Cunningham did not press the matter as he was looking to Neill to raise through Finch & Campbell \$35,000 to exploit an oil venture.

Following the visit of Reginald K. Neill to the coal field in August, 1903, his brother, Joseph H. Neill, of Wallace, Idaho, on September 3 authorized the location of a claim or subscribed for an interest, advancing \$750. Later in the month of September an assessment was levied upon the 24 subscribers, including Joseph H. Neill, for \$250 each, and Cunningham drew on each of them for that amount, and the drafts were paid. October 7th, A. B. Campbell authorized the location of two additional claims or subscribed for two more interests, paying to Cunningham for the common fund \$2,000; October 12, H. W. Collins, of Garfield, Wash., joined the enterprise and paid \$1,000. When Cunningham organized the group or association for the purpose of locating the claims, he may have had an imperfect understanding of the coal land laws; but in the fall of 1903, on one of his trips to Alaska, he traveled with a number of prominent lawyers and was fully informed by them as to the provisions of the coal-land acts applicable to Alaska and advised that he could not enter into any agreement whereby he was to receive an interest in any claim other than his own or to combine the claims. After receiving this information Cunningham did not seek any further instructions from his principals or otherwise change his plans except to substitute a salary of \$200 per month in lieu of the one-eighth interest which he intended to receive

in the other claims, and the collection of the salary was ratified by his principals when the matter was called to their attention. During the interval between the time that Cunningham clearly understood he could not proceed under the mining laws and could not agree to combine the claims and the approval of the act of April 28, 1904, substantially all the development work relied upon by the several entrymen to bring them within the provisions of the said act of April 28, 1904, was performed. During the month of July, 1903, Squire C. Chezum was employed by Cunningham to superintend the exploration of the coal field. The territory claimed by Cunningham and his associates and in their possession had theretofore been staked out, and Chezum with native laborers proceeded with the task assigned to him by searching for coal outcrops along the gulches and streams and by following if he could the measures discovered. No attempt whatever was made to open or improve a mine of coal upon any specific or particular claim, but the work consisted throughout in prospecting the field as a whole to find the extent of the coal-bearing lands to ascertain the quality and quantities of coal therein contained for the purpose of determining whether the coal deposits would warrant commercial development. Chezum restricted his activities to that portion of the field west of Clear Creek and the region south of the claims, while another foreman had charge of the prospecting that was done between Clear and Canyon Creeks. That the field between Clear and Trout Creeks was explored with a considerable degree of thoroughness is established; but little was done in the region between Clear Creek and Canyon Creek, and nothing whatever on the Cunningham, the Victor, and Frick claims. But even where the work was most thorough it consisted merely in finding and tracing the coal measures. One man, acting under the direction of Chezum, would frequently make as many as 10 openings in one day. And so little was done except to find and to trace the coal measures that in the fall of 1909 no evidence remained whatever that even this work had been done on any of the following claims: The Lucky Baldwin (Jenkins); the Lyons (Smith); the Wabash (Henry); the Ansonia (Doneen); the Plutocrat (Johnson); the Adrian (Mason); the Cunningham (Sweeney); the Boston (Page); the Victor (Baker); the Rutland (Joseph H. Neill); the Bozeman (Finch); the Bedford (Walter B. Moore); the Calais (Arthur D. Jones); the Avon (Orville D. Jones); the Tampa (Warner); the Frick (Nelson). A trail had been built across some of the claims above mentioned and what is known as Cunningham Clear Creek Camp was located on the Avon. Some open cut work was found on the following claims: The Albion (Davidson); the Tulare (Miller); the Lobster (Mullen); the Socorro (White); the Octopus (Dr. John G. Cunningham); the Maxine (Clarence Cunningham); the Candelario (Henry Wick); the Agnes (Hugh B. Wick);

the Clear (Riblet); the Deposit (Burbidge); the Carlsbad (Reginald K. Neill); and the Syndicate (Frank A. Moore). On the Collier (Campbell), the Adams (Fred Cushing Moore), and the Newgate (Scofield), short tunnels had been driven.

During the winter of 1903-4 extensive operations were carried on in the way of driving tunnels. One tunnel was driven on the Ludlow, the claim entered by Gov. Miles C. Moore, near the headwaters of Clear Creek, and a number on the Tenino, the tract entered by Collins on Trout Creek. While some of these tunnels were well timbered and while they unquestionably cost a large amount of money, not one of them was adapted to commercial development, and it was not intended that any of them should be so used. The purpose was to ascertain the depth, the thickness, and the continuity of the coal measures. Neither Chezum, who superintended the work, nor Cunningham was an engineer, and neither of them had had any experience in coal mining. The operations during the winter of 1903-4 were very expensive and besides the funds received through the assessments of the various subscribers, levied by Cunningham in September, 1903, and the proceeds of the claims sold to Campbell and Collins, Cunningham made further assessments to carry on the work. Accordingly in November, Cunningham drew on each of the subscribers in the amount of \$250, except Campbell, who contributed \$750, the equivalent of \$250 for each of three subscriptions, and again in March a further assessment in the amount of \$250 was made on each associate.

The character and purpose of these transactions are shown by the report made by Cunningham on February 29, 1904, immediately prior to the levying of the third assessment on the various subscribers. At that time Cunningham submitted to each of them an extended report covering the operations prior to that time and advised them that he was making drafts on each of them in the amount of \$250 to meet the third assessment. The report contained the following statements:

Our development to date has proven very satisfactory; and while not prepared to say there is no question about the permanency nor the character of our coal, I will state that so far as known at present the quality is superior to anything on the Pacific coast, while the quantity seems inexhaustible. * * * Our development on Trout Creek, where all our work this winter is being concentrated, consists of four tunnels, * * * not counting all the open cuts and surface work done during the summer. On Clear Creek we have about 200 feet of tunnels with innumerable open cuts, and on Carbon Creek we have also quite an amount of surface work. While it can not be hoped that with all these veins we will not meet disappointments (in fact, we already have had to figure through one fault or roll), yet there seems reasonable assurance that we have what will become a very productive property. * * * Am, therefore, making drafts this day through the National Bank of Commerce, Seattle, on each of our 27 subscribers, including writer, for \$250, and trust same will be paid on presentation.

This report, which was received by each of the subscribers and to which none of them made any objection, treats the entire transaction as a joint enterprise, in which the subscribers constituted a voluntary association. It incloses "A statement of account for the Alaska coal fields for the fiscal year ending February 1" (1904). It speaks not only of "our development" and "our coal," but also of "our work" and "our tunnel." There is not only no conflict between the arrangement set out in this report and the "verbal agreements" reduced to writing in the memorandum made by Cunningham in the journal of the association, which has already been quoted, but the report furnishes strong corroboration of the Cunningham memorandum. The circumstances connected with the one-eighth interest to be issued to Cunningham under his memorandum will be discussed hereafter. In the report of February 29, 1904, to the subscribers Cunningham mentions under "receipts" the number of subscribers at different dates and the amounts paid by them and the several assessments levied on them and paid, and notes the amount received by the associated subscribers from employees through the boarding-house store. Under the head of "disbursements" he represents the expenditure of \$9,450 in the purchase of coal claims and the payment of his salary in the amount of \$1,800. In a trial balance he shows the amounts paid by the subscribers, \$1,000 for each of the 10 original associates (and Jenkins), \$1,100 by W. W. Baker, and \$1,250 by each of the later comers except that A. B. Campbell is credited with the payment of \$3,750, the equivalent of the assessments on three subscriptions. These reports were received by the various subscribers, and each of them, except H. M. Davenport, met the assessment by honoring the draft drawn on him, Campbell, as on the previous occasions, paying the assessment for three subscriptions. During March, 1904, Cunningham was advised that W. H. Warner, of Cleveland, Ohio, and W. E. Miller, of Elyria, Ohio, had each taken from Mr. Campbell one of the two subscriptions which that gentleman had carried from October 7, 1903. Each of these gentlemen was credited on the books of the association with the payment of \$1,500 and the joint account charged with \$3,000, the amount to be refunded to Campbell.

At the time of the approval of the act of April 28, 1904, the association consisted of 27 members; the 10 original subscribers and Francis Jenkins had each contributed \$1,250, Baker, \$1,350, and each of the later comers \$1,500. Except the construction of trails, no prospect or development work of any consequence was performed after the approval of said act of April 28, 1904. At the time of the approval of said act Cunningham was in Alaska and secured a copy of its text from the newspapers which printed it in full. The original locations had followed the course or strike of the coal measures. The act of

1904 required the claims located thereunder to be surveyed in rectangular tracts containing 40, 80, or 160 acres by lines running north and south and east and west. It was, therefore, necessary to change the form of each location to bring it within the terms of the new act. Without consulting his principals, Cunningham employed a surveyor and proceeded to have the claims identified in the manner prescribed in said act. This work occupied the entire summer of 1904. While there were only 27 subscribers, Cunningham located 35 claims. All of them except the Wallula, a tract containing 80 acres, were for approximately 160 acres. Cunningham left Alaska in September or October, 1904, for the purpose of securing legal advice as to the requirements and procedure under the new law. He proceeded to Wallace, Idaho, and employed John P. Gray, Esq., one of the attorneys now appearing for the defendants. Mr. Gray prepared forms of power of attorney, declaratory statements, notices of location, and agent's affidavit, and advised Cunningham that it would be necessary to abandon the old locations and proceed under the new law. Cunningham sent the forms of power of attorney and declaratory statement to each of the subscribers, who executed and returned them. In September, 1904, an assessment in the amount of \$100 was levied on the subscribers, and Cunningham drew on each of them in that amount. The drafts were paid, except the one on Davenport.

During the month of October, 1904, Charles Sweeney, a capitalist of New York and a former resident of Spokane, acquired an interest in the field. Sweeney was the president of the Federal Mining & Smelting Co., a corporation operating extensively in the Coeur d'Alene country. He secured from H. M. Davenport the interest formerly carried by that gentleman, and paid into the common fund the sum of \$350, the assessments which Davenport had not met.

Horace C. Henry, of Seattle, Wash., banker, railroad builder, and capitalist, subscribed for an interest during the month of October, 1904, paying therefor the sum of \$1,600; and about the same time Henry White, of Wallace, Idaho, general manager of a wholesale grocery concern and vice president of the First National Bank of Wallace, became interested in the scheme through either Finch or Campbell, of Spokane. White secured the necessary papers through one or the other of these gentlemen, but the matter at that time does not appear to have been reported to Cunningham, who enters it for the first time in the month of January, 1905, explaining the entry by the statement: "Mr. White gets one interest that was carried through Mr. A. B. Campbell through Mr. Hussey."

During the same month (October, 1904), Byron C. Riblet, of Spokane, president and treasurer of the Riblet Tramway Co., purchased an interest through A. B. Campbell. It is urged that it was the understanding of both Campbell and Riblet that the latter pur-

chased a claim that had been carried by I. N. Campbell, a brother of A. B. Campbell, who died shortly before that date; but the books of Cunningham show that the claim transferred to the name of Riblet was one carried by A. B. Campbell through his private secretary, C. H. Moore.

In January, 1905, Frank F. Johnson, of Wallace, Idaho, banker; Andrew L. Scofield, of Los Angeles, Cal., an intimate friend of Clarence Cunningham, and a man of considerable fortune; and Ignatius Mullen, of Juneau, Alaska, joined the association. Scofield and Johnson each contributed \$1,600, and Mullen \$800. Concerning the claims of Johnson, Scofield, and Mullen, Cunningham entered the following memorandum in his journal:

Each of the above parties subscribed for one interest; the last named (Mullen) paid but one-half the amount due for his, but will pay balance at any time.

Ignatius Mullen was only 24 years of age when he subscribed for one interest in this field. He knew none of his associates except Clarence Cunningham, whom he had met twice; he possessed little property and was receiving a salary of \$60 per month. He was the son of the receiver of the Juneau land office.

Ignatius Mullen did not understand when he entered the association that he was to pay \$1,600 for the interest transferred to his name. He did not know the area of the claim to be located for him and did not recall at the time of trial whether, when he authorized the location of the claim, he knew the Government price of the land. He testified that "the general cost I presume, would be about \$1,600." Cunningham's reports show that up to January, 1908, Mullen had paid into the association, exclusive of the purchase price of the land, \$1,900, and the said reports show that Johnson and Scofield, whose names were entered as members of the association at the time Mullen's was entered, each paid into the association, exclusive of the Government price of the land, \$2,500. In an affidavit executed before Special Agent Love of the General Land Office, on November 11, 1907, P. M. Mullen, the receiver of the Juneau land office, and the father of Ignatius, swore:

That I have never loaned or advanced the said Ignatius Mullen any money whatsoever for the purpose of expenditure or payment upon said coal claim; that the said Ignatius Mullen, to my own knowledge, had at all times sufficient money to meet all demands in connection therewith.

The son testified that the money was paid by his father, the receiver, and explained the payment as being on account of moneys to which he was entitled for services rendered his father in part during the son's minority. After this testimony was given by the son, the father was not called as a witness.

N. B. Nelson, a merchant of Seattle, Wash., and Frank A. Moore, a son of Gov. Miles C. Moore, of Walla Walla, Wash., in March, 1905, secured interests, paying \$1,600 each. Cunningham explains the transaction in the following memorandum:

Having 35 coal claims in our land, we sold one claim each to each of the above named parties, thus making 33 paid subscriptions.

February 5, 1905, Cunningham executed affidavits before the receiver of the Juneau land office supporting various notices of location under the act of April 28, 1904, and on April 14, 1905, he filed the notices for record with the district recorder. There were 35 of these notices each of which, as above stated, was supported by the affidavit of Cunningham. The date of the alleged location was fixed in either the month of July or in the month of August, 1904. Not one of them was placed at a later date than August 14. The locations were made in behalf of the parties hereto and for the claims subsequently entered by them, with the following exceptions: Charles Sweeney was located upon the Wallula, survey No. 63, and W. W. Baker on the Belmont, survey No. 65, while Will H. Batting and K. J. Cunningham of Wallace, Idaho, were located on the Victor and Cunningham, respectively, surveys Nos. 38 and 40.

The claim in the name of Miles C. Moore is located near the north-eastern limits of the group; the one in the name of his son, Frank A., in the north tier, but not contiguous to the father's; the one of the son, Walter B., in the south tier, near the east line, while the one in the name of Moore's nephew, F. Cushing Moore, is in the south tier near the west line. The claim in the name of John A. Finch is on the east of the field, while that of his business partner, A. B. Campbell, is in the west. The claims located in the names of the original organizers with the exception of those for the Cunninghams and Miles C. Moore are all in the south tier or timber belt. That the various locations were made about the dates alleged is substantially established by the testimony of Cunningham at the trial of the case. He had at that time no specific authority to make the locations under the act of April 28, 1904. Cunningham had, however, verbal authority at least to make coal locations in behalf of each of the parties who had joined the association prior to the approval of said act, and these parties ratified his action by giving powers of attorney and executing declaratory statements in the fall of 1904. Andrew L. Scofield (the Newgate, survey No. 50, entry No. 1) did not join the association until January 31, 1905. In the notice filed in his behalf Cunningham swore that the claim was located for him July 23, 1904. Cunningham also swore that he located the following claims for the benefit of the gentlemen named, on the dates given: Horace C. Henry (the Wabash, survey No. 62, entry No. 4), July 23, 1904; Ignatius Mullen (the Lobster, survey No. 41, entry No.

5), July 21, 1904; Charles Sweeney (the Wallula, survey No. 63), July 22, 1904; Henry White (the Socorro, survey No. 45, entry No. 6), July 21, 1904; B. C. Riblet (the Clear, survey No. 68, entry No. 19), July 22, 1904; Frank F. Johnson (the Plutocrat, survey No. 55, entry No. 10), July 23, 1904; Frank A. Moore (the Syndicate, survey No. 39, entry No. 32), August 10, 1904; Nelson B. Nelson (the Frick, survey No. 37, entry No. 33), August 10, 1904. Not one of the above-named parties joined the association or authorized locations prior to October, 1904, and two did not enter until March, 1905. Notices of the locations, declaratory statements, and powers of attorney authorizing the respective locations were filed in the Juneau land office on October 10, 1905, by Cunningham.

In April, 1905, Charles S. Hubbell was employed to make a survey of the field, and this work was done during the spring and summer of that year. Thirty-five claims were surveyed; those involved the lands now in issue and the Wallula, the 80-acre tract, and the Belmont. The claims last mentioned were surveyed in the names of Sweeney and Baker in accordance with the location notices that had been recorded in their names by Clarence Cunningham April 14, 1905. The cost of surveying the group of claims was borne by the association and paid out of the common fund.

During the month of April Cunningham assessed each of the members \$100 and drew on them in that amount, and the drafts were paid. In August a further assessment in the amount of \$100 was levied and collected, and during the month H. L. Hawkins, an expert, was employed by a committee representing the association, and paid by the association out of a joint fund, to examine the field and report the conditions found. Those responsible for sending Hawkins to the field do not entirely agree as to the purpose thereof. Cunningham understood that Hawkins was to test the quality of the coal; Smith, that he was to determine its quantity; and Henry, to ascertain whether a railroad could be built to the mine. Hawkins's report indicates that it was intended that he should cover all these and other subjects.

The declaratory statements and notices of claims filed by Cunningham on October 10, 1905, corresponded with the notices of location both as to the areas applied for and as to the various dates of alleged settlement or location. Will H. Batting filed on the Victor, while Sweeney and Baker filed on the Wallula and the Belmont, respectively. K. J. Cunningham, for the Cunningham claim, did not file notice of location or declaratory statement until March 9, 1906, upon which date her notice of location, declaratory statement for the Cunningham claim, and power of attorney authorizing location by Clarence Cunningham were filed by the latter. It does not appear from Cunningham's books or reports that either Batting or K. J. Cunningham paid any assessment.

The declaratory statement of Mullen does not follow the form prepared by Mr. Gray for the other applicants and used by nearly all the rest. It contains a specific description of the land and an express declaration as to when the location was made by him through his agent. In it Mullen swears:

I came into possession of said tract of land on the 21st day of July, 1904, and have ever since remained in actual possession continuously

Mullen did not join the association or authorize the location of a claim prior to January, 1905.

October 20, 1905, Cunningham prepared and submitted to each of the subscribers—the association being at that time comprised of all the parties to this investigation—a report dealing principally with the investigations made by Hawkins, but including references to other transactions. In this report Cunningham recites that Hawkins was sent to the field pursuant to the direction of the members of the association at a meeting held on July 20 at Spokane. The text of a part of the report follows:

We went on the ground August 1 and returned to Seattle October 15. I am pleased to state that Mr. Hawkins made a most thorough, careful, and painstaking examination of the entire field owned by us, as well as a cursory examination of the coal lands of the English company adjoining. * * * In addition to the above, his map will show contours and levels from our lands to the ocean, with charts and soundings of the channel, where we are likely to build coal bunkers and wharves, besides giving approximate route and length of proposed railroad to both the lands owned by the English company and ourselves. We also ran levels and made estimate on a magnificent water power that can be made to furnish about 3,000 horsepower with a very small outlay, requiring but 2½ miles of flume and a dam about 200 feet long by 10 feet high.

Cunningham mentions that Hawkins made no estimate of that part of the field situated west of Trout Creek where most of the work had been done, owing to the fear that the measures “are thrown from their true course,” and that no estimate nor sampling was made of that part of the field from Clear Creek east to Canyon Creek, as the measures there had not been opened in such systematic manner as to warrant an opinion as to their certainty, and that that part of the field showed some confusion.

We are thus brought to that portion of our ground lying between Trout and Clear Creeks where the measures are unbroken and developed sufficiently to show approximately one hundred million (100,000,000) long tons above the tunnel level we have projected, all of which can be mined from one tunnel. * * * Mr. Hawkins finds four of our coal claims of but little value for coal so far as can be determined at present, but as they contain heavy timber recommends their being held for that purpose. * * * You are already advised that we are holding considerable tracts of land for timber which we will require in large quantities, but there is no law in Alaska for acquiring titles to timber lands. Consequently would consider it advisable to try to secure some cheap scrip and cover all we can before beginning any very extensive operations. * * * We have located a permanent tunnel site on Clear Creek which will cut all the various veins described in Mr. Hawkins’s report and

afford the best possible outlet. * * * We are now building quarters to transfer our camp from Trout Creek to this point and as soon as the buildings are completed we will cut off most of our expenses until definite plans are completed.

Under the head of "Receipts" is the following: "Assessments paid by claim owners, \$55,400," and under "Disbursements," the payment of \$5,800 as salary to Cunningham. A trial balance follows and the report concludes with the statement that there are a number of unpaid bills and—

to meet these accounts and leave a comfortable balance on hand, I am making draft on all of our coowners for \$200 and trust all will pay same promptly and enable me to meet these accounts at once.

Cunningham accompanied his statement by the report of Hawkins. The claims are referred to in the Hawkins report as the "coal property in Kayak recording district controlled by Clarence Cunningham." The situation and the topography are given and the coal measures described. The claims are spoken of throughout the report as "this property," and there is no description therein of any individual claim. It is indicated that the coal measures in portions of the field are broken. In that part of the field, carefully examined by Hawkins and which Cunningham states lay between Clear and Trout Creeks, Hawkins found coal deposits which he estimated at 97,410,840 long tons. Under "Development" Hawkins says:

For developing this property I would recommend that a tunnel be driven across the measures as outlined on maps.

Then follows a description of the proposed tunnel and an estimate of its cost, \$184,000.

The timber supply.—A very good growth of mine timber covers this property to an elevation of about 1,200 feet above sea level and will supply the mine for quite a number of years, but not sufficient for the life of the mine. As there is good timber on land adjoining this property, I would recommend that as much as possible of this be secured.

Railroad and harbor.—The waters in this vicinity do not afford good harbor facilities, and about the only feasible point for harbor and dock is on the southeasterly point of Kanak Island * * *. The only objection to this place for a harbor is that in the winter for short periods the ice forms on the mud flats and is carried back and forth by the tide.

Estimated cost.—A railroad can be constructed from the mine to the harbor above mentioned on very easy grades, 24 miles being practically level and about 3 miles on not to exceed $1\frac{1}{2}$ per cent. The greater portion of this road will be across low lands, where the track can be laid down before much work is done, and later the roadbed raised by hauling gravel from the glacier moraine, where there is an excellent place to work a steam shovel. The approximate cost of construction and equipment of this railroad would be about as follows:

Items * * *; total, \$724,500; estimated cost of harbor, \$275,000.

Under "Water power available" the power site mentioned in Cunningham's report is described with some particularity, and it is stated that about 4,000 horsepower can be secured, and "this would afford cheap mine haulage."

Other coal properties.—Adjoining the Cunningham claims on the north are 11 claims which, I understand, are controlled by one man as agent for the different locators, and while there has been no work done I traced the croppings of the upper series across this property and have shown same on the map attached. I would recommend the purchase of several of these claims, to wit: 1, 2, 6, 7, 8, 11, and 10, as I think they will add considerable to the value of this property, as the coal can be mined from the same opening and a large additional tonnage secured.

Hawkins concludes his report by finding that the lands are adapted for handling the coal very cheaply; that the amount of coal above water level is exceptionally large; that its quality is such as to assure it a ready market on the Pacific coast; that its location will permit its being supplied to the various steamship lines and several projected railroads; that—

the large amount of coal already exposed, the natural conditions surrounding same, and the comparative cheapness with which it can be put into the market will justify thorough equipment and permanent improvements.

And in this connection he recommended that the tunnel projected be driven without delay; that a survey be run for the railroad line during the winter; and that a capable harbor man or engineer be employed to report on the character and expense of dock and bunkers. He then mentioned that the Alaska Central Railroad was building to the Matanuska field, where great bodies of superior coal were located, admonished the claim holders to act quickly so as to place their coals on the market before those of the Matanuska field became available, and concluded with—

so having such short haulage from your mine to tidewater you are in a position to act quickly and secure the advantage offered by being first in the market.

The assessments levied by Cunningham on the several members at the time that he furnished them with his own and the foregoing report of Hawkins were promptly paid, and not a single member or claimant filed any protest or made any objection.

Reginald K. and Joseph H. Neill declined to pay the assessments of \$100 each levied on the members during the months of April and August, 1905, respectively, at the time said assessments were made. Reginald K. Neill returned to Cunningham the drafts drawn on him. Neill testifies that "Cunningham notified me if I did not pay up he would let my claim lapse." The October drafts in the sum of \$200, which were accompanied by Cunningham's report of October 20, 1905, and also the report of the expert Hawkins, were promptly paid by both the Neills and the two former assessments as well, each of them sending \$400.

December 19, 1905, the 35 plats of survey were approved by the surveyor general of Alaska and all of them were filed in the local office at Juneau December 22, 1905. Following the recommendations of Hawkins that a harbor man be secured to survey the harbor at Kanak, Engineer Jamme was employed for that purpose in the

fall of 1905 and executed his survey thereof during the following winter. His expenses in the sum of \$556.40 were paid by the association.

In January, 1906, Cunningham set about securing the execution of applications for patent on the part of the various members of the association, and on February 21, 1906, filed 25 of them in the local office at Juneau. The remaining 8 were filed by Cunningham within a few days thereafter. The applications were for the tracts embraced in the declaratory statements, with the exception that Will H. Bating transferred his claim by deed to W. W. Baker and the latter abandoned his filing upon the Belmont and applied to enter the Victor, and Charles Sweeney abandoned his filing for the Wallula and applied to enter the Cunningham. Sweeney's application to purchase the Cunningham was filed February 21, 1906, prior to the filing of the declaratory statement of K. J. Cunningham for said tract. The notices issued from the Juneau land office were published in a newspaper and were posted on the land and in the local land office. The expense of making and filing the applications and of posting and publishing the notices was borne by the association. The field notes of the surveys accompanied the several applications.

February 6, 1906, Cunningham addressed a communication to the Acting Commissioner of the Land Office, stating that for himself, and as agent for a number of others, he had secured several claims of 160 acres each, had had them surveyed, and a large amount of development done to determine the value of the land.

We are now publishing our notices for patent, and as soon as the time required under the act elapses (six months) for adversing us we will make our final proof and ask for patent. Each claimant pays for the work done on his own claim and expects to derive all the benefit therefrom, but owing to the nature of the country and in the interest of economical mining it would be necessary to run a long cross-cut tunnel to reach the measures at a depth where transportation can reach the ground and proper drainage secured. The cost of this work will be too great for any individual to bear, but the benefit will accrue equally to all claims located on the belt after they are fully opened (by affording drainage and haulage way). Can we form a voluntary association to jointly build this tunnel without prejudicing our right to secure title from the Government before said title is actually secured?

The Acting Commissioner replied to this communication under date of February 24, 1906, carefully rehearsing the statements made by Cunningham, including the erroneous statement that "each claimant pays for the work done on his own claim," and upon the basis of these statements said:

You are advised that it is contrary to the practice of this office to undertake to render an authoritative or binding opinion in any case other than one in which the record has been regularly transmitted for consideration and action. However, in view of the interests involved it is not deemed improper to state that, while the construction of a tunnel such as proposed would call for close scrutiny of each entry made for claims in this group as to the good faith of the entryman and as to whether he was securing his claim strictly for his own use and not directly or indirectly for the use

and benefit of others or of an association or corporation, yet it is believed that the construction of the proposed drainage and working tunnel by a voluntary association to be composed of a portion or all of the coal claimants interested in the group, by means of their own personal and private funds, would not militate against the making of coal entries by the several claimants and would not imperil their right to secure patent upon said entries. The issuance of patent would, without doubt, be delayed until a full investigation of the matter could be had and the Land Department be fully advised as to all the facts in the premises

The proposed tunnel was not driven, and no work whatever was done thereon.

June 11, 1906, Frederick Burbidge, Clarence Cunningham, Miles C. Moore, C. J. Smith, and H. C. Henry associated themselves together for the purpose of forming a corporation under the laws of the State of Washington and adopted articles of incorporation. The name of the corporation was the Bering River Railroad Co., and its purpose to construct, maintain, and operate a railroad from a point near Kanak, in the District of Alaska, running thence in a northerly direction up the Bering River to a point on Clear Creek, in the District of Alaska. The amount of the capital stock was fixed at \$500,000; the principal place of business of the corporation, at Seattle, Wash.; and the number of trustees to manage the affairs of the corporation fixed at five, the incorporators above mentioned. The expenses incident to the organization of this corporation were paid by the association out of the common fund.

There was expended by the association for examining route of proposed railroad in November, 1906, the amount of \$36.65, and in December following the route of the road was fixed by survey at a cost to the association of \$987.15. The survey extended from a "point opposite Kanak" to Clear Creek. The terminus of the road on the property was near the Cunningham camp on Clear Creek.

Not only was the son of the receiver of Juneau land office permitted to secure an interest in these lands by Cunningham, but the register of the same office was employed in 1906 to prepare forms of notice, affidavits, and other papers to be used in final proof. He was paid at the joint expense of all the locators.

Special Agent Love, of the General Land Office, in December, 1906, anticipating the submission of proofs on the various claims, prepared and mailed to each claimant a form of affidavit to be executed and returned to him. In the latter part of December, Cunningham visited Seattle for the purpose of discussing these affidavits and interviewed Horace Henry and C. J. Smith with respect thereto. During the discussion of the matter Smith took the affidavit prepared for Cunningham's signature and, thinking it was the one prepared for him, proceeded to mutilate it by crossing out a number of expressions therein contained and with pencil suggested the incorporation of other words. Being advised by Cunningham that the form of affidavit had been prepared by Special Agent Love, Smith signed the one

intended for him without erasing the expressions which he had crossed out in the one intended for Cunningham, indorsing over his signature the following statement:

This affiant has discussed with applicants of adjoining claims the advisability of joint development and operation. But this was for convenience and economical reasons and did not contemplate any share in ownership nor is there any agreement with them.

The part of the affidavit prepared for Cunningham, showing the mutilations and interlineations made by Smith, is here reproduced as follows:

“That said location was made for the sole use and benefit of the affiant, and has ever since so remained his, and in his exclusive control; that at no time prior to location or at such time, or since, has affiant entered into any agreement, (~~expressed or implied, or pledged himself~~) by promise or otherwise, (~~expressed or implied,~~) by which the title to said land, or any part thereof, or interest therein, is to pass to any other person or association whatsoever;) ~~that in event said claim goes to entry in the U. S. land office at Juneau, Alaska, and the receiver's receipt for the purchase price issues, he will not be under any contract or obligation or promise to sell or convey said tract to any person or persons or association, or to put same into any company or joint holding for any purpose, or to otherwise dispose~~ and that when said land is patented he ~~of same, but~~ will be free in every way to hold said tract, to lease or sell it at any future time;”

There was also indorsed at the bottom of the mutilated affidavit which was executed by Clarence Cunningham, after his signature thereto, the following memorandum in pencil:

That he has discussed with applicants of adjoining claims the desirability of joint development of said property and adjoining properties for economic reasons, but is under no agreement to do so, and if it should be done the operation of said claim would be for his exclusive account and benefit.

Henry, who was present at the conference and participated therein, modified his affidavit by indorsing thereon the following statement:

I have supposed that sooner or later to develop my property it would be best for adjoining owners to join for the purpose, but have never considered the matter with any person.

Cunningham executed the affidavit prepared for him, with the mutilations, interlineations, and the additions above described, and forwarded it to Special Agent Love, who, under date of February 5, 1907, returned it for correction. In a letter dated Spokane, Wash., February 18, 1907, Cunningham addressed Love and explained how the mutilations occurred. Cunningham apparently did

not notice the penciled addition to his affidavit until after he had signed his letter to Love, and the following was added:

P. S.—Since writing the above, I saw for the first time the pencil scratches, interlineations, etc., contained in my affidavit. I don't know much about them, but imagine it was done when in company with Mr. Smith and Mr. Henry. We tried to frame up something that might be less objectionable to good *church members*, but finally decided there was nothing in it we could not sign, so let it go as it was.

(Signed) C.

During this visit to Seattle, Cunningham attended a meeting for the election of officers of the Bering River Railroad. The expense of the trip was borne by the association.

Early in the year 1907, prior to the issuance of any certificate, Cunningham started to Alaska for the purpose of securing timber and water rights, but being delayed did not proceed farther than Seattle, and he authorized Hubbell and Chezum to attend to those matters.

February 26, 1907, the first proofs were filed, consisting in each instance of affidavits as to the character of the land and as to the improvements thereon, executed by H. L. Hawkins and S. C. Chezum, and affidavits that notice of the application had been posted on the claim, executed by James McGrath and Clarence Cunningham, affidavit of agent as to character of improvements, executed by Clarence Cunningham, and the special affidavit required by Special Agent Love, that the claim was made for the use and benefit of the applicant, evidence of citizenship, etc. As these proofs were filed and the purchase money paid, the register and receiver proceeded to issue their final certificates and final receipts. Entries 1 to 4 (Scofield, Jenkins, Smith, and Henry) were issued February 26–28; that is, the register issued final certificate on the 26th, but the receiver's certificate is dated the 28th of February, 1907; entries 5 to 10, inclusive (Mullen, White, Collins, Davidson, Doneen, and Johnson), March 13, 1907; entries Nos. 11 and 12 (Dr. John G. and Clarence Cunningham), March 20, 1907; entries 13 to 15 (Campbell, Henry and Hugh B. Wick), March 29, 1907; entries 16 to 21 (Mason, Miller, Sweeney, Riblet, Fred Cushing Moore, and Page), April 11, 1907; entries 22 to 30 (Baker, Burbidge, R. K. Neill, J. H. Neill, Miles C. Moore, Finch, Walter B. Moore, Arthur D. Jones, and O. D. Jones), April 23, 1907; and entries 31 to 33 (Warner, Frank A. Moore, and Nelson), October 25, 1907.

Pursuant to the instructions which he received from Clarence Cunningham, Hubbell began the survey of timber claims south of the Cunningham group early in March, 1907. The surveys were executed under applications by Clarence Cunningham to file soldiers' additional claims. A soldier's additional right is assignable and is the only right in the nature of scrip that can be located on the tim-

ber lands of Alaska. The work in the field was begun on March 10 with survey No. 198 and completed April 22 on survey No. 881. The records of this office disclose that Hubbell made the following surveys under Cunningham's said applications to locate soldiers' additional rights: Surveys Nos. 198 and 199, surveys Nos. 610 to 624 inclusive, and survey No. 881. Beginning with survey No. 198 whose initial point is on Lake Kushtaka at its outlet, the source of Stillwater Creek, a series of surveys embrace the country immediately adjacent to said creek on the south and west, almost to its junction with Bering River; a second series begins north of the outlet of the lake, omitting a small tract on the shore of the lake, and extends east to the "toe" of "Mule Shoe Bend" in Stillwater Creek, thence east and south, taking the lands immediately north and east of said creek; a third series connects the lands of the Cunningham group with the timber lands on Stillwater Creek through the valley of Clear Creek from the Avon and Lucky Baldwin coal claims, through which the proposed railroad runs; a fourth series connects the Cunningham group of coal claims with the body of land on Stillwater Creek through the valley of Trout Creek. The field notes show these lands are, with the exception of a very small area, covered with a fair or good growth of hemlock and spruce timbers. There was expended on these timber surveys or in connection therewith by the association or out of the common fund contributed by each claim holder nearly \$4,000. These surveys were approved by the surveyor general at various dates from the latter part of November, 1907, to January 2, 1908. The inclusion of the lands in the Chugach National Forest stopped their purchase.

March 1, 1907, Cunningham submitted a statement of account of the coal fields to each of the subscribers. Under "boarding-house store" he shows the disbursement of \$1,858.20 and explains it as follows: "Boarding-house store represents supplies of all kinds on hand, such as groceries, provisions, bedding, rubber boots, coats, tobacco, etc.;" and under "salary" he shows the payment of \$7,800 to himself; and under "railroad and terminal" that \$1,862.50 had been spent for the examination of harbor by George E. Jamme, and in surveying for railroad terminals, etc.; under "receipts" he shows the payment of \$71,850 by the claim owners; under "trial balance," the payment of \$2,050 by each of the 10 original organizers, \$2,150 by Baker, and \$2,300 by all the later comers, with the following exceptions: Jenkins \$1,700, Mullen \$1,900; and W. H. Warner \$2,100.

In the early part of April, 1907, Clarence Cunningham entered into negotiations with Stephen Birch, the managing director of the Alaska Syndicate, a concern controlled by the Guggenheims of New York, resulting in Cunningham's calling a meeting of the claim holders in

the office of Finch & Campbell at Spokane, Wash., May 15, 1907. April 23, 1907, Cunningham sent the following telegram to Birch: "Am calling meeting to perfect organization so proposition can be arranged;" and on May 1, 1907, Cunningham wrote Birch stating that he had called a meeting "at which time we can incorporate and pass resolutions that will be effective, whereas should we now submit one to you and have it accepted, we might not be able to 'deliver the goods.' " Responding to the call of Cunningham, 18 of the claim holders met at the time and place designated. Those in attendance were: Miles C. Moore, John A. Finch, A. B. Campbell, F. H. Mason, Clarence Cunningham, J. G. Cunningham, Charles Sweeney, O. D. Jones, A. D. Jones, M. Doneen, F. C. Davidson, H. W. Collins, Alfred Page, Francis Jenkins, F. F. Johnson, R. K. Neill, Frederick Burbidge, A. L. Scofield. Gov. Miles C. Moore was elected chairman of the meeting, and Frederick Burbidge secretary. Cunningham submitted to the claim holders the Guggenheim propositions, which were: First, that the Guggenheims mine the coal on a royalty basis; second, that the claim owners incorporate, deed their lands to the corporation, receive as consideration therefor one-half of the capital stock, the other half of the capital stock to be held in the treasury and sold to the Guggenheims for a sum sufficient to equip and develop the property, the operating company to build bunkers at the coast terminal of the railroad and enter into contracts with the Guggenheims as to the disposition of the coal. The plans submitted by the Guggenheims did not meet with the approval of the majority of the claim holders, and it was decided that they at that time would make no proposition to the Guggenheim company.

Thereupon, on motion of Mr. Sweeney, seconded by Mr. Finch, the chairman was authorized to appoint a committee of five who should organize a corporation for the purpose of acquiring coal claims owned by those present and those of such other claim owners as might desire to join the corporation, the committee to secure deeds to the mining claims and to issue receipts therefor and to take all necessary steps to complete the organization of the company ready for the transaction of business.

There were appointed on that committee C. J. Smith, Clarence Cunningham, H. W. Collins, R. K. Neill, and Frederick Burbidge. During the progress of the meeting the question was raised whether at that time the claim holders had the legal right to form a corporation for the purpose of taking over the properties, and it was decided to consult counsel with respect thereto. W. J. C. Wakefield, the personal attorney for Messrs. Finch & Campbell, was selected, called before the meeting and requested to give his opinion. Wakefield advised them that they had the legal right to form a corporation, and he was subsequently retained by the committee to prepare articles of incorporation, but, owing to differences of opinion which developed among the members of the committee itself, Wakefield decided it

would be advisable to take the deeds to a trust company. The Union Trust Co. of Spokane was selected and forms of deeds prepared by Wakefield and sent to the various claim owners. The deeds, while given to a trust company, were absolute in terms and conveyed to said company all the title the claim owners possessed. Eighteen of the claim owners, to wit, Henry W. Collins, A. L. Scofield, Michael Doneen, Frank F. Johnson, Orville D. Jones, Alfred Page, John A. Finch, Francis Jenkins, Henry White, Walter B. Moore, Fred C. Davidson, Joseph H. Neill, Fred Cushing Moore, Reginald K. Neill, Amassa B. Campbell, Byron C. Riblet, Hugh B. Wick, and Henry Wick, executed and delivered their deeds to Mr. Wakefield. Two, Charles Sweeney and Frederick H. Mason, were uncertain whether they executed deeds; five, Miles C. Moore, Charles J. Smith, Horace Henry, Clarence Cunningham, and Dr. John G. Cunningham, were not questioned with respect thereto; three, Frank Moore, Nelson B. Nelson, and W. H. Warner, had not received their certificates, and the copy sent to Ignatius Mullen failed to reach him. Two, W. W. Baker and A. D. Jones, were not satisfied that they had the legal right to convey their claims before the issuance of patent. Frederick Burbridge, the secretary of the meeting and one of the committee to organize the corporation, left the State of Washington for a European trip shortly after the May meeting. A deed was sent to and received by him while abroad. He intended to execute it, but decided to await his return to Washington; but, upon arriving home and learning of the arrangement that had been entered into between a committee representing the claimants and the Guggenheims at Salt Lake, he declined to execute the deed and actively set about to frustrate the Salt Lake plan.

The Guggenheims becoming impatient at the delay, urged Clarence Cunningham to secure from the claim holders a definite proposition, stating to him that they must have coal and unless they secured it from the Cunningham people they would look elsewhere. Accordingly Cunningham called a second meeting of the claim holders in the office of Finch & Campbell in the city of Spokane on July 16, 1907. At this meeting Finch presided and H. W. Collins was secretary. Those present in person were: Messrs. Page, Mason, Jones, Campbell, Finch, Dr. Cunningham, Clarence Cunningham, Doneen, Collins, Moore, O. D. Jones, and Jenkins; and the following represented by proxy: Messrs. Davidson, Warner, Henry Wick, Hugh B. Wick, Scofield, Mullen, Nelson, Miles C. Moore, W. B. Moore, Johnson, and White. It is disclosed by the minutes of the meeting that Mr. Wakefield was absent and that no information could be obtained as to the number of deeds received by that gentleman for deposit with the Union Trust Co. The minutes of the meeting show:

A motion was made and carried that two members be added to the committee, a majority of whom would have full authority to instruct the Union Trust Co. to make

conveyance to a corporation to be formed whenever it is deemed advisable. The chair appointed Messrs. F. H. Mason and A. B. Campbell as additional members of the aforesaid committee.

Cunningham reported the position taken by the Guggenheims and stated that it was desired by them that a definite proposition from the claim owners be submitted to Eccles at Salt Lake on the 20th of that month, and the minutes recite:

A motion was unanimously carried that the chair appoint a committee of three to go to Salt Lake on the above date and negotiate the best terms possible for all concerned. After a full discussion and at the suggestion of several of the members present the chair appointed as such committee Miles C. Moore, A. B. Campbell, and Clarence Cunningham. All of the *members* present agreed to ratify any action taken by said committee. (*Italics are mine.*)

It will be noted that the subscribers or claimants are referred to as "members" and the distinction is made between "the members present" and others who, although absent, are presumptively also members, although at the time of this meeting the only association of which any of them could have been members must have been the association which existed from the beginning, as no change in their relationship in this regard had occurred.

Gov. Moore, Campbell, and Cunningham accepted their appointments and proceeded to Salt Lake to carry into effect the instructions given. They met Eccles and the attorney of the Guggenheims and represented to them that at a meeting participated in by 25 of the 33 coal claimants a resolution was unanimously passed authorizing the committee to enter into negotiations with parties to secure the equipment, development, and operation of the consolidated property and the sale of its product; that to effect consolidation it had been determined that each of said entrymen should convey the title to his individual tract to the Union Trust Co., of Spokane, Wash., in trust, to be dealt with in such manner as should be directed by C. J. Smith, R. K. Neill, H. W. Collins, Frederiek Burbidge, Fred H. Mason, A. B. Campbell, and Clarence Cunningham, or a majority of them. Acting for themselves and as a committee representing their associates under the resolution adopted at Spokane on July 16, Moore, Campbell, and Cunningham submitted for the consideration of Daniel Guggenheim certain proposals which were in brief that a corporation be formed with a capital stock of \$5,000,000 divided into 50,000 shares of the par value of \$100 each; that the title of all of said properties including water rights be transferred to said corporation in consideration for which 25,000 shares of the stock were to be distributed to the vendors of the claims, the remaining 25,000 shares of stock to be deposited in escrow with the Bank of California, Seattle, with instructions to make delivery of same to Guggenheim or his nominee upon the payment to said depository to the credit of

said corporation of \$250,000, said money to be considered as a "working capital" to be expended by said corporation in the equipment, development, and operation of said property. Guggenheim was given the exclusive privilege to purchase the "run of the mine" for a period of 25 years at the rate of \$2.25 per ton of 2,240 pounds, the coal to be delivered at the mine either in bunkers to be provided by the corporation for that purpose or upon cars, as said Guggenheim might direct. Guggenheim was to build a railroad from the portal of the mine to tidewater and the mining corporation was to furnish grounds to establish and maintain its tracks, switches, depots, terminals, stations, and other facilities. He was further authorized to purchase at the rate of \$1.75 per ton of 2,240 pounds all the coals necessary for the operation of the railway. He was allowed a period of 25 days within which to elect to cause an examination of the property to be made and, if he caused this examination, four months within which to determine whether he would accept the proposition. Guggenheim sent the experts to examine the property within the period specified, and notified the committee of his acceptance of the proposition within the time fixed. The expenses of the examination of the field made by Guggenheim were borne by the association and were subsequently repaid by Guggenheim in the sum of \$1,359.60.

The contract entered into between the committee representing the members of the association and the Guggenheims was not satisfactory to a large majority of such members, and many of them upon learning the terms of the contract withdrew their deeds from Wakefield.

On or about August 4, 1907, H. T. Jones, a special agent of the Land Office, called on one of the entrymen, Fred H. Mason, and interviewed him with respect to these coal entries. The matter was thoroughly discussed on the afternoon of the day on which the call was made, and on the following morning Jones again visited Mason, taking with him a paper prepared for the signature of the latter. Mason read the statement and said: "I must state that you have not exaggerated it a particle." Whereupon Jones asked him to sign the statement. Mason requested the privilege of consulting his attorney before doing so and, with Jones, he proceeded to the office of Wakefield and meeting A. B. Campbell the four considered the paper, after which both Mason and Campbell signed it, the latter corroborating the former's statement, and each of them swore to it before Jones. It is represented therein:

We have often talked of what we were going to do with our claims both before and after making entry. The popular idea with us is that after we get our titles from the Government we will make an effort to get a railroad to our lands so as to get the coal out for shipment; we thought that if it were perfectly legal we would form a company and issue stock for the securing of bonds for the building of the road.

In September, 1907, Cunningham expended for the purpose of locating and holding a water right at the outlet of Lake Kushtaka \$205, and during the month of December, 1907, \$776 in the examination of the harbor and in surveying for railroad.

January 1, 1908, he submitted a statement of account of the Alaska coal fields, wherein he shows the receipt of \$131,050. This amount, however, included the purchase price of the land, which was paid direct by the several claimants to the receiver at the Juneau land office. Under "disbursements" it was shown that \$9,800 had been paid to him in salary, \$2,638.15 for railroad and terminal, \$3,955.10, timber land, and \$205, water right, with the following explanations:

Railroad and terminal account has been increased by new surveys found necessary. This will be further explained in accompanying letter. Timber-land account consists of expenditures made in surveying and platting 1,600 acres of timber land adjacent to our coal claims. It is our intention to secure title to this land by use of soldiers' additional homestead scrip after surveys have been approved. Water-right account is a sum expended for labor on water right located on Lake Kushtaka for power purposes.

January 15, 1908, Cunningham wrote to the register and receiver at Juneau concerning the filing of a map of the Bering River Railroad Co., and, speaking of the claims, he said:

I am particularly anxious to have these matters go through now at the earliest possible moment, for it looks as though it would be up to us to furnish our own transportation, in which case I must have all my financial and preliminary arrangements made before the season opens and take advantage of the long summer days if we expect to get into the market by next fall. You will therefore confer a great favor if you can assist me in any way, and if you wish it any information or advice furnished me will be treated as strictly confidential.

March 17, 1908, a map of preliminary route of the Bering River Railway Co. was filed in the Juneau land office. The survey was executed by Charles S. Hubbell, and appears to have been signed by *J. C. Smith*, president, and *James Cunningham*, secretary. As delineated upon the map, the road started near the southern point of Kanak Island and ran northwest to near the north boundary of said island; thence northeast across the mud flats to a point south of the mouth of Bering River; thence along the valley of said river to the point where the waters of Stillwater Creek are discharged therein; thence across said river and along the valley of Stillwater Creek to Mule Shoe Bend, at the mouth of Clear Creek; thence along the valley of Clear Creek to the Cunningham camp on the Avon claim.

On or about March 4, 1908, L. R. Glavis, then Chief of Field Division of the General Land Office, and H. T. Jones, special agent, interviewed Orville D. Jones and Frank F. Johnson, of Wallace, Idaho, with respect to these entries. They went over the matter

carefully with both Jones and with Johnson on the afternoon of the day the first call was made and were informed by each of these entrymen that they had certain papers or reports that had been submitted to them by Cunningham during the course of the proceedings. At the request of Glavis and Special Agent Jones these reports were produced, and on the following day Glavis and Special Agent Jones again called upon O. D. Jones, and, after further discussion, Glavis prepared a statement which O. D. Jones signed and verified. After setting forth that he authorized the location of a claim in the spring of 1903, O. D. Jones said:

Since then I have been assessed from time to time and have paid Cunningham \$4,200, which included the price of the land. Cunningham was agent for 31 other entrymen, who, like myself, advanced various sums of money. The money was expended by Cunningham to develop and improve the coal field as a whole; nearly all of the 32 coal claimants are acquainted with each other; they are men of the best business standing and prominence in their respective localities; the matter of the formation of a company was never formally discussed at any of our meetings, but we have discussed this question among ourselves, as we were well satisfied that we could not handle the claims individually; anyone who is at all acquainted with coal mining knows that one claim could not be handled profitably, especially in Alaska, where expenses are so great, since the large expense preliminary to the opening of the coal field would not warrant it; we have, therefore, understood among ourselves that when title had been secured we would form a company and combine the entire group; this was, however, positively the only understanding; we had no written agreement or any written instrument whatsoever.

The foregoing sworn statement was then presented to F. F. Johnson and he attached thereto a statement, under oath, that he secured the claim of some member who dropped out, and that—

I have read the foregoing affidavits and know from my own personal knowledge that the contents thereof are true with respect of my own claim in the Cunningham group.

Just prior to their departure from Wallace, F. Cushing Moore, for whom Glavis and Jones had inquired, waited upon them, read the affidavits that had been signed by Orville D. Jones and corroborated by Frank F. Johnson, as aforesaid, and confirmed them in the following language:

* * * I first became interested in the matter in the fall of 1902, I think was the date. I have read the foregoing affidavit of Orville D. Jones, and hereby corroborate the same and state that the matters mentioned by Mr. Jones in connection with his understanding concerning the working of his coal claim are also true with respect to my own claim. I was located by Clarence Cunningham among the very first persons.

The statement was signed and sworn to by Moore.

Glavis and Jones after procuring a statement from White proceeded to Seattle, Wash.; and on the morning of the 6th of March, called upon Clarence Cunningham. They went over the matter very carefully. During the course of the interview Cunningham produced for examination a journal in which he had kept an account of the proceedings. Glavis secured the volume and was permitted

to take it to the hotel for the purpose of checking certain matters. Cunningham also furnished Glavis the copies of one or two reports which the latter had not obtained in Wallace, Idaho. By engagement,* Glavis and Jones met Cunningham in the afternoon of the same day and shortly after the second conference began Gov. Miles C. Moore came in and participated therein. Near the conclusion of the interview the hotel stenographer was called and Glavis in the presence of Cunningham and conformably with his suggestions dictated a statement which was reduced to writing by the stenographer, corrected, signed, and sworn to by Cunningham.

In this verified statement Cunningham sets forth in some detail the circumstances attending the location and entry of the several claims and explains the negotiations with the Guggenheims. Among other things he says:

I have kept a complete record of expenditures made in the development of these claims, and the statements which I have made and the journal which I have kept are true and correct statements of the facts. * * * We have had no written agreement whatever with any corporation and the only understanding which we have had is that among ourselves. We have had an understanding that when the patents had been secured we would form a company for the development of the coal fields, but none of the claims were taken up for the benefit of a corporation, but merely with the idea that when titles were secured we would combine our claims and work the coal fields for ourselves. We have always proceeded with this end in view, for anyone familiar with coal mining well knows that it is impracticable to mine an individual claim of 160 acres, especially in Alaska, where expenses are so great.

As agent for the various coal claimants, I am personally familiar with their ideas, having talked with them concerning the matter, and know that they are thoroughly familiar with the conditions and the facts as stated in this affidavit.

Under date of March 17, 1908, Miles C. Moore addressed a communication to this office referring to the fact that he had made coal entry No. 26 of the series now under consideration:

During a visit to Washington in January of the present year, I was told that the issuance of patent on this and other claims in which Clarence Cunningham acted as agent was delayed pending the receipt from the Juneau office of certain plats. * * * A short time ago the writer met Messrs. Glavis and Jones, who were again investigating these entries. Their report can not be otherwise than favorable, but even if favorable it does not follow that still other agents will be detailed to make still other reports. The entries have been gone over repeatedly and favorably reported on, but still our patents are delayed and the development of the mines and the building of the line of transportation necessary to bring the coal to tidewater are being retarded. The coal, which is of superior quality, is needed all along the coast, as the coal here is now high in price and of inferior quality. If this coal, some of which is identical with the Pocahontas coal used by the battleships, was now available, it would not be necessary to send supplies around the Horn in foreign transports.

These are interests too important to be subordinated to tedious technicalities and the delays occasioned by clerical errors for which our people are in no wise responsible. In conclusion, it is urged that if there is any failure to comply strictly with the Alaska coal-land laws or the Federal statutes, or if fraud is charged, the nature of the irregularities or the charge should be made known.

April 10, 1908, Glavis, in company with Clarence Cunningham, called on Charles J. Smith. Cunningham introduced Glavis to Smith, informing the latter that the former had an affidavit which he wished signed. Smith expressed his displeasure and stated that he would sign no more affidavits; but after further conference and after rewriting the form that had been suggested by Glavis and putting it in his own words he executed it and swore to it. It contains the following statement:

* * * I have read the foregoing affidavit of Clarence Cunningham, made on the 6th day of March, who was and now is my agent. I am well acquainted with most of the other coal-land entrymen for whom Cunningham is agent, and know of my own personal knowledge that the statements made in the affidavit of said Cunningham are true in so far as they pertain to the Guggenheim Syndicate and the understanding existing between the various entrymen as to the disposition of claims. I know positively that the Guggenheims have nothing to do with our claims. We have understood among the entrymen that when title was secured we would probably form a company for the operation of the entire group on the grounds of economy.

Glavis accompanied by Clarence Cunningham also called on Horace Henry. Henry did not on the occasion of this visit execute the affidavit submitted by Glavis, although he was advised by Cunningham that there was no objection thereto. Some time subsequent, however, he did execute the affidavit as it had been prepared by Glavis, and on April 22, 1908, mailed it to the latter. In this affidavit Henry swears:

I have read the foregoing affidavit of Clarence Cunningham, who was and now is my agent. I am well acquainted with most of the other coal-land entrymen for whom Cunningham is agent, and know of my own personal knowledge that the statements made in the foregoing affidavit are true in so far as they pertain to the Guggenheim Syndicate and the understanding existing among ourselves as to the disposition of our claims; I know positively that the Guggenheims had nothing to do with our claims whatever; we have understood among ourselves that when title was secured we would form a company and combine the entire group, since the conditions are such that one claim could not be profitably mined, as any one familiar with coal mining appreciates.

H. W. Collins, April 21; Arthur D. Jones and Frederick Burbidge, April 23; Henry Wick, April 24; W. H. Warner, April 25; Fred H. Mason, April 27; Fred C. Davidson and Charles Sweeney, April 30; Michael Doneen, May 2; W. E. Miller, May 9; and Hugh B. Wick, May 11, 1908, executed and delivered to Glavis affidavits identical with the one of Henry above set forth.

Miles C. Moore, after attending the conference between Glavis, Jones, and Cunningham at Seattle on March 6, 1908, and after writing the letter, hereinabove set forth, to this office under date of March 17, 1908, on April 25 rewrote the form of affidavit which Glavis had prepared and sent to him, declaring:

I have read the foregoing affidavit of Clarence Cunningham, who was and now is my agent; I am well acquainted with most of the other coal entrymen for whom Clarence

Cunningham is agent; I know of my own personal knowledge that the statements made in the foregoing affidavit are true in so far as they pertain to the Guggenheim syndicate and the understanding existing among ourselves as to the disposition of our claims; I know positively that the Guggenheims had nothing to do with our claims whatever and were not considered or thought of in connection therewith until after the issue of final receipts; and that the tentative negotiations, began at the meeting at Salt Lake, came to nothing.

There has been a tacit understanding among the claimants represented by Clarence Cunningham, that when title was perfected a company would be formed to develop the claims, but no written or specific agreement to do so was ever entered into, but conditions are such that one claim can not be profitably worked, as any one familiar with coal mining appreciates.

Moore signed the above statement, swore to it, and forwarded it to Glavis by mail. Before executing his affidavit, Mason attempted to consult Campbell and Finch, but as these gentlemen were out of town he called upon A. D. Jones and ascertained that he had received a similar form of affidavit and intended executing it. W. H. Warner, in a letter accompanying his affidavit, said: "Mr. Cunningham's statements in regard to the matter are correct and I believe fully cover them;" while Burbidge in his letter of April 23, 1908, transmitting his affidavit, represents:

I have your letter of the 16th instant inclosing copy of affidavit of Mr. Clarence Cunningham in relation to coal-land entries in Alaska. This affidavit covers all of facts in the matter, so far as I know them, and I have therefore signed the accompanying affidavit in corroboration thereof, and return it to you herewith.

Henry Wick, in his letter of April 24, makes these additional statements:

Complying with the request contained in your letter of the 18th I return to you herewith affidavit duly executed corroborating Mr. Cunningham's affidavit, which I certainly think is entirely and completely true and correct. I have kept in touch with this matter, though at a distance, quite closely, and I am certain that no collusion or connection with the Guggenheims has obtained in any way nor in my opinion is there the slightest possibility of ever doing so, as I understand they have entirely changed their plans as to the route of their railroad.

April 28, 1908, Cunningham executed an affidavit modifying the one of March 6, 1908; and on September 4, 1908, he executed an affidavit explaining the agreement set forth in the journal, stating that at the time the memorandum was made he and his associates were proceeding with a view of acquiring the title to the lands under the mining laws. Referring to the location of the 22 claims in the spring of 1903, he said:

These claims were recorded for each of the 11 subscribers above referred to and for 11 other persons with whom affiant was associated in Idaho; some of the latter persons not choosing to take claims so far away declined to come forward with their subscriptions and Mr. A. B. Campbell temporarily advanced the pro rata expenses until their associates could be found to take their places.

And to the relocations under the act of 1904:

Affiant's engineer was immediately instructed to establish a meridian, erect his monument, and proceed to make his location surveys in accordance with the act of April 28, 1904. This work took all of the summer of 1904 and no development was carried on. On the completion of said surveys it was found that there were 35 claims embraced therein. Entry was at once made by 33 persons, all bona fide, and including the former associates who had made locations under the theory that said lands could be entered as mineral claims. * * * When the surveys were first made in 1904 affiant undertook to locate in 640-acre tracts, with four entrymen for each location, as is provided in the laws applicable to the States and Territories. This right was denied by the department in their construction of the statute applicable to Alaska.

March 25, 1909, there was filed in the Juneau land office a map showing line of definite location for the Bering River Railroad Company. The map and field notes were verified by the affidavit of H. L. Hawkins, locating engineer, executed March 12, 1909, and attested by the signature of H. C. Henry, vice president of the Bering River Railroad Co., and Clarence Cunningham, secretary. The line of definite location did not materially depart from that shown on the preliminary map hereinbefore described.

Cunningham at one time informed Mason "there was a lot of coal there," but none on his claim. To use his language, Mason formed the idea "I was sort of on the outside of the coal group."

On a map prepared by the Forest Service and introduced in evidence by the defense it is indicated there are three-fourths of a million feet of timber on Mason's claim. It is also indicated on said map that all the claims of the southern tier contain large quantities of timber, except that upon the Lyons and the Bedford no estimate is given.

During the progress of the May meeting at Spokane, Charles Sweeney, president of the Federal Mining & Smelting Co., a large Guggenheim concern, opposed the Guggenheim proposition from the floor of the meeting, but proposed to buy 10 claims and to pay therefor \$15,000 each in cash, and in private offered Collins \$22,000 for his claim, the Tenino. Sweeney testified that from his experience of 40 years in mining and locating claims he considered that the possibilities were that a number of the claims were of no value and that from what he had been told he doubted whether his claim was of any value and whether it would warrant the expense of working it. He therefore suggested that a "corporation be organized taking in all of these claims, and that if any person in the crowd had a claim that was of no value he would get something from the claims that were valuable."

There was no provision made at the May meeting for ascertaining the value of any of the individual claims. The committee was merely directed to organize a corporation for the purpose of taking over the several claims and no distinction was made between them.

Among those who executed and delivered deeds on terms of equality may be mentioned Collins, who declined \$22,000 for his claim, and Riblet and Joseph H. Neill, who after the controversy arose accepted \$20,000 and \$15,000, respectively, for their claims.

During the course of a visit to the western coast of Alaska in the year 1903 Horace V. Winchell, geologist and mining engineer, was shown samples of coal that had been taken from near Katalla in the Controller Bay region. Winchell was so impressed with the quality of the coal that he kept the matter in mind and thereafter examined the reports of the United States Geological Survey with reference to Alaskan coal. Further pursuing an investigation into the matter, he was advised to consult Clarence Cunningham, and visited Seattle for the purpose of meeting him in the latter part of April, 1908. Cunningham advised Winchell that a number of coal claims had been entered, but that so far as he knew none were for sale. Cunningham, however, promised to inform Winchell if he should hear of anyone desiring to sell a claim; and in the summer of 1908 he notified Winchell that a claim could be purchased. Winchell thereafter bought claims from the persons, on the dates, and at the prices following: The Frick from the Nelson estate August 8, 1908, \$15,000; the Deposit from Burbidge, October 4, 1908, \$18,000; the Carlsbad from R. K. Neill, February 2, 1909, \$15,500; the Newgate from Scofield, March 12, 1909, \$15,500; the Clear from Riblet, on June 22, 1909, \$20,000; and the Rutland from J. H. Neill, August 15, 1909, \$15,000. The claim last purchased, the Rutland, from J. H. Neill, was taken under a general warranty deed, while the others were under a special warranty that did not guarantee the title from the Government. Two of the claims purchased by Winchell, the Frick and the Newgate, are situated in the north tier, but are not contiguous, the claim located and entered in the name of Frank A. Moore separating them. One, the Clear, is immediately south of the Newgate; two, the Deposit and the Carlsbad, are contiguous, and the latter corners with the Clear, while the Rutland is located to the extreme west of the field. The proposed Hawkins tunnel beginning a short distance south runs through the Deposit and also through the Lobster, the claim entered in the name of Mullen, and cuts the Frick at the southwest corner. Winchell had not examined any of the claims prior to their purchase, but late in the summer of 1909, in company with John P. Gray, the attorney, and Clarence Cunningham he started to Alaska for the purpose of visiting the coal field, and was aboard the ill-fated steamer *Ohio* when it sank in the Alaskan waters. In company with the gentlemen named he finally succeeded in reaching the claims in the fall of 1909, a short time prior to the beginning of this investigation. He found coal outcrops on the Frick and visited all the other claims purchased by him, except

the Rutland. Winchell made no examination of the claims in the southern tier, but testified that he had been offered an opportunity to purchase them. He had been informed that he could buy several of them, but declined to do so. Not only did Winchell make a careful examination of the claims, but he also secured the services of his brother and Frank C. Green, mining engineers and geologists, and those gentlemen accompanied him to the field. Winchell was asked, based on his knowledge of the field, what area he considered necessary for the development of a mine, and answered:

Well, based upon what I saw of this field, it would be necessary to make a good many explorations before deciding which, if any, portion of it could be worked in the whole 5,000 acres. There is one single positively workable coal vein. I do not think and do not consider that the whole group of claims present an area at the present time sufficiently developed to justify the expense of building a railroad and wharves, and putting up tipples, and building residences, and putting up power plants for the purpose of operation.

At the trial of the case each of the 31 living claimants, in response to direct questions of his counsel, explicitly denied that he had prior to location or entry any understanding, or had entered into any agreement or compact, whereby he was to convey his claim to a corporation or to hold it for the common use and benefit of the other claimants or in any manner convey any interest therein to any other person or persons. They admitted that whatever was done in prospecting and exploring the field was at the joint expense of all of them, and in their proofs asserted common ownership in tunnels on individual claims. A number of them stated that they made their respective locations as investments, not expecting to secure any benefit therefrom themselves, but believed the property if secured would be a valuable heritage to their children or grandchildren. Those who executed the affidavits prepared by Glavis containing statements that there was an understanding that the claims should be combined offered the explanation that they had in mind when executing said affidavits the conferences held at Spokane in May and July after the issuance of their several certificates. Mason, however, admitted that he understood from the beginning that it was the intention of those making locations to convey their claims to a corporation for the purposes of development. As illustrating the understanding of these claimants as to the necessity for cooperation before any paying mine could be opened, the following extracts from their testimony are given:

Smith: I had no understanding whatever with reference to any joint operation except the belief in my mind and the knowledge in my mind that no single man could ever operate his claim up there by himself, but I was willing and contented to rest until I could have proper and reasonable opportunity to join with one, two, three, fifty, or more people to make a mine, because I knew that no one person or no two persons or no three persons could ever make a mine.

Henry: Why, no man with any sense would think that he could go up in Alaska there, 25 miles from the coast, and operate a coal mine alone. If this were operated it would have to be some kind of an operation together * * *. No; that means, if it means anything, that I know it would cost \$1,500,000 or \$2,000,000 to get that coal out—get it to a harbor—and there is no man could do it with one claim.

Finch: We (referring to himself and Clarence Cunningham) both realize that coal without a railway in Alaska would be no better than country rock.

PERSONNEL OF CLAIMANTS—FINANCIAL STANDING—BUSINESS RELATIONS.

The men engaged in this transaction may be divided generally into four groups according to their places of residence and business associations: The Wallace (Idaho) group, composed of the friends and associates of Clarence Cunningham; the Spokane (Wash.) group, the business associates of John A. Finch and A. B. Campbell and the friends of Dr. John G. Cunningham; third, the Walla Walla group, Miles C. Moore, his relatives and business associates; and, fourth, the Seattle group, Charles J. Smith and those connected with him in business enterprises. Scofield of California belongs to the Wallace group. Warner, Miller, and the two Wicks of Ohio and Sweeney of New York may be classed with the Spokane group. Not all of these men know each other personally, but each claimant, with the possible exception of Nelson, whose business and social relations do not very clearly appear, and Ignatius Mullen, the son of the receiver, a distinctive outsider, was closely connected in business enterprises with one or more of the leading men of the several groups, and these leaders were in turn associated in financial ventures. Finch, Campbell, Moore, and Smith were successful business men; and it was their connection with the enterprise that led many of those who made entries to associate themselves with Cunningham, and confidence in the business sagacity of these men induced the greater number of the claimants to remain in the association and honor the many drafts made upon them by Cunningham. While very popular personally and while some of the claimants went into the scheme upon his invitation, Cunningham was not regarded as a man possessing sound judgment in business affairs. Collectively the entrymen herein appear to command sufficient resources to carry out the various enterprises constituting the general scheme.

THE DEMAND FOR COAL—THE OPPORTUNITY FOR GAIN—THE MEANS.

While the location of these lands precluded the possibility of a paying mine being opened and operated on any individual tract of 160 acres, the plan to open and develop a mine on the property herein involved was entirely feasible. According to the estimates of the experts who had been sent to examine the field, the lands embraced

in these claims contain coal in enormous quantities and excellent qualities. The expense of opening a mine, constructing a railroad from its portals to the sea, and the erection of wharves would be great, but the men behind this movement had the required capital and could easily secure the money necessary to carry the project into effect. For years the demands of trade and commerce on the Pacific coast had greatly exceeded the supply of available coal; the prices were exorbitant, and in many instances the quality of the coal inferior. Steamboats were plying between the various ports of Alaska, railroads were being projected and built, and copper and gold mines were being opened. The Government was transporting the supply for its Army and Navy around the Horn from the Atlantic seaboard a distance of 15,000 miles. There was every reason to believe that a mine of coal operated with intelligence in this field would prove a splendid investment. Not only was there an opportunity to place this coal on the markets of the Pacific coast and supply the needs of the Government, but it was very probable that much if not all of it would find a ready sale in the near vicinity of the mine. The land was owned by the Government and no one man could buy a tract large enough to open thereon a paying mine, but 33 men operating together could get a sufficient quantity to open and operate a paying mine. What, therefore, was their purpose in investing their money in this scheme?

THE FACTS CONSIDERED.

The testimony of the 31 living entrymen that prior to their respective locations no agreement had been entered into to combine the claims, and, with the exception of Mason, that prior to location there was no understanding that the claims should be so combined, has been given due weight; but the statements made by many of them under oath prior to the trial, in conflict with their testimony, and the facts and circumstances either admitted by them or clearly established by the record must control. Counsel for the claimants have urged in their brief that, in order to find that there was such a prior understanding or agreement, it is necessary to hold that each of the 31 claimants who testified was "guilty of the crime of willful and deliberate perjury." Experience in the analysis of human testimony, however, does not preclude a more lenient judgment. This is a case where the substance of a transaction was different from its form and in which the form was adopted solely in an attempt at outward compliance with the law which required that particular form. In such circumstances it is neither unnatural nor unusual that under an attack the participants should later persuade themselves that the form was, in fact, the substance, but in seeking to ascertain now what was then substance and what was merely form, the present declarations of the

parties are far less significant than are their words and acts during the progress of the transaction itself.

Applying this principle, there seems no doubt that in the beginning the participants were "subscribers" for joint "interests" and not owners of separate "claims" and that the substantial character of the transaction never changed. In 1905 they were still "co-owners" of a single property, although in order to acquire it each particular claim had been allotted to a particular individual and had been entered by him in his name.

In the printed brief for the claimants it is said (p. 88):

It will be urged that the memorandum contained on the first page of the Cunningham journal evidences an intention or purpose on his part to combine these claims in one group, to be owned and held by a single corporation, of whose stock he expected to receive one-eighth for his services. That such was the thought and purpose of Mr. Cunningham at the time of writing this memorandum, we do not affect to gainsay. And if this plan or purpose was made known and assented to by the several entrymen, the same inference would be equally applicable to them.

It has already been shown that the reports made by Cunningham to the subscribers were in substantial compliance with this memorandum, the plan and purpose of which was thus "made known" to the several entrymen without a word of dissent from any of them. Indeed, in discussing the report issued by Cunningham on February 29, 1904, and sent to the various claimants, it is said in the printed brief that-

The terms "subscribers" and "assessments," contained in the statement, do, however, it is frankly admitted, deserve attention, and, if coupled with other sufficient facts evidencing conspiracy, might justify the finding that a conspiracy in fact existed, in the absence of any explanation or affirmative proof to the contrary.

The "explanation or affirmative proof to the contrary" consists in the present denials of the claimants. And although their counsel dismiss with little discussion the use of the words "our development," "our coal," and "our work," in the Cunningham report of October 20, 1905, they admit that "there remains, however, one matter contained in this report which is entitled to consideration, namely, the statement at its close that he is 'making drafts on all of our co-owners.'" And they say that "it must be admitted that the word 'coowners' in its legal sense means joint owners or tenants in common and implies a common interest." Indeed, so clear is their realization of the significance of this word "co-owners," used by Cunningham in this report in 1905, which was sent to the claimants, that the position taken with respect to it is quite different from that taken with regard to the memorandum in the Cunningham journal. The quotation already made shows that counsel concede that the several entrymen would be bound by it, if it had been made known to them and they had assented to it, but the position taken in the brief with regard to the word "co-owners" is that "moreover, even

if he had intended to use this word in its technical sense, it would not bind the other claimants, even if they as laymen read and understood it in that meaning." Clearly, the latter position can not be maintained.

What we are seeking to ascertain now is the understanding which these claimants then had as to the nature of their relations to each other and to the enterprise in which they were all engaged.

The explanations given by the several parties that their admissions in the Glavis affidavit referred to the agreements reached at the May and July meetings are not convincing. The affidavit of Cunningham which each of them corroborated contained the explicit statement: "We have always proceeded with this end in view;" and the reason was given that anyone familiar with coal mining knows it is impracticable to mine an individual claim of 160 acres, especially in Alaska, where expenses are so great. Moreover, at the meetings in May and July, 1907, an express agreement was reached and that agreement was incorporated into the minutes of the meeting.

In describing the understanding had between the various claimants Gov. Moore states it was a tacit understanding. The word "tacit" was not in the draft of the affidavit submitted by Glavis to Moore, and was, therefore, a word of Moore's selection. He rewrote the form prepared by Glavis for the purpose of expressing the thought in his own language. It was unquestionably his purpose to show that there had been no express agreement; that the matter had proceeded no further than a "tacit" understanding between the parties. Gov. Moore explains his affidavit in his testimony by saying that he referred to the agreement in the May meeting, after issuance of the majority of the certificates. But that agreement was not a "tacit" one; it was an express and written agreement. He had presided at the May meeting, and at the trial he identified the minutes of said meeting. He knew, therefore, that the members who attended that meeting expressed their will in a resolution which was discussed, adopted, and reduced to writing. He knew, also, while not present at the July meeting, that the "members" who attended it adopted resolutions which were embodied in the minutes. As one of a committee he journeyed to Salt Lake and entered into a contract under the authority of the resolutions adopted at said meeting.

Smith had mutilated the affidavit prepared by Love long before either the May or July meetings held at Spokane, and inserted in his affidavit a paragraph not essentially different from the one which he dictated to his stenographer and swore to before Glavis. When he was informed that Glavis was a special agent and had a form of affidavit which he desired executed, he replied that he would not execute any other affidavit. Is it not reasonable to infer that he

had in mind the trouble he had experienced in December, 1906, in modifying the form of affidavit prepared by Love so that he could sign it? Cunningham stated in his letter to Love that he and Smith and Henry "tried to frame up something that might be less objectionable to good church members, but finally decided there was nothing in it we could not sign, so let it go as it was." The conclusion is irresistible that Smith mutilated the Love affidavit because he was unwilling to swear to it in the form in which it was presented to him and that he signed and swore to the Glavis affidavit after he had modified it because it told the truth. Henry was one of those who participated in the conference in which the Love affidavit was considered, and he did not execute the Glavis affidavit until after he had had time to thoroughly examine it. The others who executed the Glavis affidavits received them through the mail and had ample opportunity before executing to digest them. More than a year had elapsed from the time the first certificates were issued before Glavis sent those forms of affidavits to the several claimants. Gov. Moore and others of them had complained of the delay. They were anxious to secure their patents if for no other reason than to proceed with the development of the claims. They knew the affidavit was sent to them by a Government officer investigating the integrity of the claims. It is not likely, therefore, that any of these men would have executed the paper without giving it careful attention.

The representations made in the letter and telegram of Cunningham to Birch that a meeting had been called to organize a corporation do not in any manner indicate that no agreement to combine the claims existed. It was not intended at the outset that any corporation should be formed until after the titles were secured and Cunningham's conclusion that any resolution adopted by the association before the organization of the corporation would be ineffective was amply warranted by what subsequently occurred, and the fact that differences of opinion developed among the 33 claimants or the 33 subscribers when they came to the point where it was necessary to take definite action looking to the development of the property or the disposition of the claims in no wise refutes the Government's charges. It could not very well be that 33 men each of whom was prominent in his respective locality and who thought and acted for himself should assemble and unanimously agree upon a plan whereby their joint claims were to be operated or, if they were to be disposed of, the terms of the sale. The Government does not charge that any of them had authorized Cunningham to dispose of his interest in the property. An agreement that they would combine their claims for the common use and benefit of all would not carry with it an understanding that the property was to be turned over to the Guggenheims, and opposition to the Guggenheim deal does not indicate that there

was not an agreement to combine. As members of the association they all stood on equal footings. Each man was at liberty to represent his individual interest as one of the joint stockholders in the concern. The plan of Cunningham to organize a corporation and have it take over the claims before submitting the Guggenheim proposition was a wise one from his standpoint, because after the several claims passed into corporate control the majority of the stockholder claimants could dictate its policy. The original agreement, as reduced to writing and recorded by Cunningham, contemplated the formation of a corporation as soon as the titles were secured, and Cunningham entered into negotiations with Birch and called the meeting of the claim holders to organize a corporation immediately after the first certificates were issued and probably before a majority of them had issued. Birch fixes the date of his first interview with Cunningham in the fore part of April, 1907. Scarcely more than a dozen of the certificates had issued prior to April. When the resolution was introduced that a corporation be formed to take over the claims, evidently on terms of equality, not a single one of the 18 members present objected. The resolution fulfilled in its entirety the original agreement, and all of the claim holders present stood ready to carry it into effect and manifested their intentions of so doing. So decided was the opposition to a departure from the original plan and giving control of the property to the Guggenheims that the proposition was withdrawn, and the Guggenheims were notified that the members would not deal with them at that time. Whether it was before or after it was demonstrated by the temper of the meeting that the Guggenheim proposition would not be approved that Sweeney made his offer to purchase any 10 of the claims, paying in cash therefor \$15,000 each, is not shown. Sweeney, on the floor, opposed the Guggenheim plan, although at that time he was the president of one of the great properties controlled by the Guggenheims. That the members of the association stood ready to carry the original agreement into effect is conclusively shown by the fact that 18 of them, many of whom did not attend the meeting, immediately executed deeds to the Union Trust Co. and forwarded them to Wakefield for the purpose of organizing the corporation to take over the properties. Some of those who did not sign the deeds participated in the two meetings and clearly indicated their intentions of doing so, and no doubt would have done so if there had been no change in the plan. The impatience of the Guggenheims, however, resulted in the call for the second meeting at Spokane and, finally, in the execution of the contract entered into at Salt Lake. The proposition made to the Guggenheims by Moore, Campbell, and Cunningham was at utter variance from the terms of the agreement under which these men associated themselves, and no wonder that many of them protested against it. Had the leaders of this associa-

tion obeyed the will of the members thereof by attempting to carry into effect the agreement under which the association was formed there is no reason to believe that a single member would have refused to carry out his part of the compact. Riblet, Scofield, and the two Neills executed and delivered deeds to the claims standing in their names, while Burbidge stood ready to do so upon the terms of the original agreement.

The fact that it was represented to the Guggenheims at Salt Lake there were 33 independent claimants to be reckoned with in nowise strengthens the defense. It is not to be supposed that any sane men representing these entrymen as a committee would suggest to a prospective purchaser of the property that the claims were illegal and the several entries subject to forfeiture.

At the time the conferences with the Guggenheim representatives took place at Salt Lake, Clarence Cunningham was fully advised as to the law; and it is evident from the record that both Campbell and Moore then fully understood the limitations of the coal-land acts.

The assertion of many of the claim holders that they authorized locations not expecting to reap any profit therefrom themselves but hoped that the claims would prove a good investment to their descendants is not supported by their acts. It is not probable that one man having no intention or plan of combining his claim with those of his neighbors and who intended to hold it for his children or grandchildren would immediately upon the issuance of his certificate agree to convey his claim to a corporation for the purposes of joint exploitation, and it is inconceivable that 25 or 30 men would under similar circumstances do so.

The sale of the six claims to Winchell does not weaken the Government's case. Five of the vendors had expressed their willingness to combine their claims with those of their associates, and four of them had executed and delivered deeds looking to that end. The sixth claim was purchased from the estate of a deceased member. Winchell, the purchaser, dealt with Cunningham and secured from that gentleman information that led to the purchase of some if not all of the claims. Scofield, from whom one of the claims was secured, was growing old and was in ill health when the sale was made, and had retired from business at the date of the trial. Burbidge and Reginald K. Neill had both actively opposed a number of Cunningham's projects, while they all received for their claims amounts in excess of the proposed Guggenheim capitalization. Having shown their willingness to carry into effect the agreement entered into and the leaders having attempted to change the plan, they no doubt regarded themselves as absolved from further obligation. There could have been no legal agreement—no binding compact—entered into between these parties prior to entry to work the claims in com-

mon or to hold them for the joint use and benefit of all the participants in the scheme. Moreover, there is nothing to indicate that it is Winchell's purpose to frustrate the development of the property as a whole in the event that titles are acquired. The claims purchased by him were not in a compact body, and according to his testimony and in harmony with the entire record it can be safely said that in the form in which they are situated the lands held by Winchell are worthless for the purposes of independent commercial development. That strategically they occupy a commanding portion of the field is perhaps true, and no doubt that should these claims go to patent the other claim holders or their assignees will have to reach an understanding with Winchell before they can successfully operate the remaining portions of the field.

That all the work so far done was paid for from the common fund is not denied. It is admitted by the claimants and frankly stated in the brief of their counsel that one claim of 160 acres can not be profitably worked, that sometime and somehow the claims must be operated together. Is it reasonable to suppose that business men would agree to the common investment of their moneys to jointly explore a coal field in Alaska with the understanding that the several claims should be operated separately, or with no understanding with respect thereto? Would they consent to spend money jointly where there was to be no common profit? The work preliminary to entry, while more burdensome when left to individual effort, might have been accomplished without combination. Would they do those things in common that might be done individually and leave to individual effort that which must be done in common if done at all?

If there had been no understanding that the claims should constitute a single property would the members of this association have permitted their claims to be located in any portion of the field without inquiring as to their accessibility, the coal therein contained, or the means by which it could be utilized? Knowing that an area of 160 acres could not be successfully operated and that the greater the area the more valuable the property, would men connected by ties of blood have consented that their claims be scattered throughout the field? Would men who had been associated together as partners since their youth and who had grown rich together have agreed to the placing of their claims at remote distances from each other? If each claimant was to receive a single tract and no interest in any other, would Cunningham have located the great majority of the men who first went into the scheme and made its success possible on the timber claims of the southern tier, claims which possessed but little value as compared with the others and which Winchell would not buy? Would Ignatius Mullen have been given a tract in the very center of the system, one practically dominating the development of

the entire field? If there was no prior agreement, would Clarence Cunningham in April, 1907, before many of the certificates were issued, have entered into negotiations with the Guggenheims looking to the disposition of the combined properties; and would Campbell, Moore, and Cunningham have attempted to speak for all the claimants, at Salt Lake, stating there were "33 tracts of coal land of 160 acres each, aggregating 5,280 acres," when at that time certificates had not issued on three of the claims?

The amounts contributed by the several entrymen were substantially the same. If it was not understood there was to be a common profit, would the 16 upon whose claims nothing whatever was done have permitted the use of their funds for the development of the other claims, and would 32 of them have suffered their joint funds to be expended in driving the expensive tunnels on one claim, the Tenino?

The plan to secure timber lands and water rights for the benefit of the mine was recommended by Hawkins in the fall of 1905, and arrangements were made for the survey of these timber claims before any of the certificates issued, and these surveys were so contrived that the outlet of Lake Kushtaka and the approaches thereto from the northeast were dominated, the waters of Stillwater Creek controlled, while the beds of Clear and Trout Creeks outside of the Cunningham group were completely embraced therein. The forms of these surveys show clearly that the lands were not taken for independent operation and that such claims would be valuable only as an adjunct to the mine. The line of the proposed railroad for several miles passes over lands embraced in these timber claims. The timber on the various tracts can be easily conveyed to either the proposed mine on Clear Creek through the valley of said stream or to the old workings on the Tenino through the valley of Trout Creek. The acquisition of the timber tracts would practically insure a monopoly of the waters of Kushtaka Lake and the several streams above mentioned, and would protect the power site recommended by Hawkins in 1905 and located by Cunningham in 1907.

Sweeney explains the scheme in language that is unmistakable. From his 40 years' experience in mining he concluded that some of the claims were without value, and that his own was among the number. Yet by organizing a corporation to take over the claims, "if any person in the crowd had a claim that was of no value he would get something from the claims that were valuable." But the plan to organize the corporation was not originated by Sweeney. It was formed in the beginning, and there was not at any time a deviation therefrom. The resolutions adopted at the meeting held at Spokane in May, 1907, express its purposes. The organization of the corporation to take over on terms of equality all the claims is in

harmony with the action, or, rather, the repose, of these men, who, after receiving Cunningham's various reports showing the joint development at common expense of the field as a whole, entered no protest and continued to honor the drafts made upon them, or, in Cunningham's language, to pay the assessments levied upon them. It is in keeping with the indifference with which they received the reports of the expert, Hawkins, that four of the claims were of no value for coal, but contained timber in sufficient quantities to authorize their retention. It comports with their acquiescence in the expenditure of their individual funds for the incorporation and survey of a railroad from the claims to tidewater. It explains why none of them objected to the use of their money for exploring the harbor, acquiring water rights, and securing the survey of timber lands. It accounts for the equanimity with which these men accepted the statement of Hawkins that large portions of the field were faulted, but that one portion, to wit, the part situated between Clear and Trout Creeks, contained deposits of coal of such enormous value as to justify the expense of opening and equipping a mine, the construction of a railroad from its portals to tidewater, and the erection and maintenance of docks at the sea.

A further discussion of the facts is not necessary. They speak for themselves and speak plainly. There was not at any time a single act performed that connected any claimant with the precise tract he claimed to locate. There was not a dollar spent by any locator individually or by agent on the land he entered, but every act done and each dollar disbursed were for the purpose of determining whether the field as a whole contained workable deposits of coal.

Prior to the hearing, eighteen of the claimants admitted, under the solemn sanction of an oath, that they proceeded from the beginning with the understanding that when the patents were secured they would form a company for the development of the property.

The plan from the outset was to acquire a coal field at joint expense to be developed for the common benefit. There was not at any time a departure from this original compact save the substitution of the salary to Cunningham for the one-eighth interest he intended to secure in the several claims. Whether operating with the alleged view of acquiring title under the mining laws prior to October, 1903, or under the provisions of sections 2347 to 2352, inclusive, Revised Statutes, or under the act of April 28, 1904, or before or after certificates issued, the system was the same. During September, 1903, an assessment was levied and paid. These assessments were repeated between October, 1903, and April 28, 1904, and were thereafter continued from time to time, two of them being levied after the issuance of the certificates.

Carrying into effect the purpose of acquiring this coal field for the common use and benefit of the members of the association, claims

were located and entries made in the names of individuals, but the making of these locations and entries in the manner indicated were but incidents in the transaction, but means to an end, and the names of the individuals were used only to effect a colorable compliance with the law. Each location was made and each tract was entered with the understanding and under an agreement that the lands so located and entered should be held for the common use and benefit of all the members in the association, and it was further understood and agreed that the claims located and entered for the common use and benefit should be consolidated into one property and taken over by a corporation to be organized by the members of the association.

They exercised no choice in the selection of their claims, manifested no interest in their individual values, and (except perhaps Baker) sought no information as to their respective locations. The field jointly acquired by all of them and explored at the common expense was the only object of their solicitude.

THE COAL LAND LAWS, THEIR LIMITATIONS, AND THE PROVISIONS APPLICABLE TO ALASKA.

Sections 2347 to 2352, inclusive, of the Revised Statutes, commonly known as the coal laws, provide in brief that every person over the age of 21 years who is a citizen of the United States, or who has declared his intention to become such, may purchase from the United States 160 acres of coal land, or an association of two or more persons 320 acres and no more, except that an association composed of four or more persons, which has expended the sum of \$5,000 in opening and improving a mine, may purchase 640 acres. Prior to the enactment of an act approved June 6, 1900 (31 Stats., 638), the coal-land laws of the United States had not been extended to Alaska. The act in question provided "that so much of the public-land laws of the United States are hereby extended to the District of Alaska as relate to coal lands, namely, sections 2347 to 2352, inclusive, of the Revised Statutes." While the provisions of the coal-land laws were fully extended to Alaska by the statute above quoted, no titles could then be acquired to coal lands in that District, because under the provisions of the law a declaratory statement could not be filed upon nor entry made of unsurveyed land, and the public land surveys had not been extended over any part of that country. While a lawful claim could have been initiated by the discovery of coal and the opening and improving of a mine, maintained by possession and protected by filing a declaratory statement or application therefor after the survey of the land, yet as no base and meridians had been established in Alaska there were no means by which those who located claims could force the extension of the public surveys. In this condition of affairs there was a natural hesitation on the part

of those desiring to acquire the coal lands to take possession of them and make the necessary expenditures to hold them under the law. It was this condition that prompted the passage of the act approved April 28, 1904 (33 Stat., 525), amending prior laws and making provision for the location and entry of unsurveyed coal lands in the District of Alaska.

In an effort to prevent monopoly the Congress prescribed the area that could be included in a single purchase by one person or by an association of persons, and declared that one who either by himself or as a member of an association made one purchase was thereafter disqualified to acquire coal lands from the Government. A number of unlawful expedients have been adopted by those seeking to acquire Government coal land in excess of the quantity the law permits; and in *United States v. Portland Coal & Coke Co.* (173 Fed. Rep., 566), the court considered a case similar to the one under consideration, and it was held:

If the scheme was not unlawful each member of the combination would have a legal right to compel his fellow members to hold each and every tract for the benefit of all and to have an accounting of all profits derived from the mining operations on each and every tract, although the legal title might be retained by the individual members in severalty, so that the object of the combination was to acquire coal lands in excess of 320 acres for an association, although the law fixes the maximum quantity of 320 acres.

It is contended, however, by the claimants that the act of April 28, 1904, affords an exclusive remedy and that under it titles to unsurveyed coal lands in Alaska can be obtained without reference to the restrictive provisions of the coal-land law.¹

CONSTRUCTION OF THE ACT OF APRIL 28, 1904.

It is well established that the acts of Congress granting portions of the public lands for any cause or providing for their disposition shall be strictly construed and that the grant shall not be enlarged by implication.

The Supreme Court in the case of *Wisconsin Central Railroad v. The United States* (164 U. S., 190), held:

Statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee.

And in the earlier decision of *Rice v. Railroad Co.* (1 Black, 358):

Legislative grants must be interpreted if practicable so as to effect the intention of the grantor, but if the words are ambiguous the true rule is to construe them most strongly against the grantee. Whatever privileges are granted to a corporation and the grant comes under the revision of the courts it is to be construed strictly against the corporation and in favor of the public, and nothing passes except what is given in clear and explicit terms.

¹ For the text of the several coal-land acts applicable to Alaska, see appendix.

In *Leavenworth, Lawrence & Galveston Railroad Co. v. The United States* (92 U. S., 733) it was declared:

Where rights claimed under the United States are set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them. The rule announced in the former decisions of this court, that a grant by the United States is strictly construed against the grantee applies as well to grants to a State to aid in building railroads as to one granting special privileges to a private corporation.

In the case of *Blair v. Chicago* (201 U. S., 400) the court considered the question of the construction of statutes granting franchises, and declared the rule to be (syllabus):

One asserting private rights in public property under grants of franchises must show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied.

And the court quoted with approval from the case of the *Binghampton Bridge* (3 Wall., 51), in which it was held:

The principle is this, that all rights which are asserted against the State must be clearly defined and not raised by inference or presumption, and if the charter is silent about a power it does not exist. If on a fair reading of the instrument reasonable doubts arise as to the proper interpretation to be given it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State.

The court in the further consideration of the case of *Blair v. Chicago*, referring to the rule in the *Binghampton Bridge* case, set forth above, said: "This principle has been declared axiomatic as a doctrine of this court," and cited *Fertilizing Co. v. Hyde Park* (97 U. S., 659); *Slidell v. Grandjean* (111 U. S., 412); *Coosaw Mining Co. v. South Carolina* (144 U. S., 550); and *Knoxville Water Co. v. Knoxville* (200 U. S., 22).

The case of *Slidell v. Grandjean*, cited with approval in *Blair v. Chicago*, was one arising under the public-land laws, and the court considered therein the effect of a land grant, and in disposing of the case used this language:

It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms or as to its general purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual. Nothing can be inferred against the State. As a reason for this rule it is often stated that such acts are usually drawn by interested parties, and they are presumed to claim all they are entitled to. The rule has been adopted and followed by this court in many instances in the construction of statutes of this description. (*Charles River Bridge v. Warren Bridge*, 11 Pet., 420, 536; *Dubuque & Pacific Railroad Co. v. Litchfield*, 23 How., 66, 88; the *Delaware Railroad Tax*, 18 Wall., 206.) The rule is a wise one; it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.

The Supreme Court in the case of *Morton v. Nebraska* (21 Wall., 660) considered the question whether saline lands in the district of Nebraska might be taken by military bounty land warrants which were locatable on lands subject to private entry, and pointed out that it had been the policy of the Government since the acquisition of the Northwest Territory and the inauguration of the public-land system to reserve salt springs from sale, and concluded:

An intention to abandon a policy which had secured to the States admitted before 1854 donations of great value can not be imputed to Congress unless the law on the subject admits of no other construction.

In *Mining Co. v. Consolidated Mining Co.* (102 U. S., 167) the question before the court was whether a grant to California of sections 16 and 36 embraced mineral lands, and the court held:

Such lands were by the settled policy of the General Government excluded from all grants.

The court discussed at some length the conditions under which California was settled and the history of mining in that section. It noticed that Congress did not until 1866, or subsequent to the admission of the State of California and the date of the grant in question, pass any general mining law, notwithstanding that mines of great value were being operated and that the rights of many people were unsettled. The court decided that while Congress had not enacted into law any general plan by which title to mineral lands could be acquired, it was its policy to reserve those lands until such time as it saw proper to adopt a system for their disposition, and said:

We are forced to the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the State.

Coming directly to the act under consideration it is observed that in 1873 the Congress formulated its policy as to the disposition of the public coal lands of the United States; the laws relating thereto were codified and carried into the revision of the statutes in 1874 under sections 2347 to 2352, inclusive. These laws were extended to Alaska by the act approved June 6, 1900 (31 Stat., 658); and under a title declaring it to be an amendment of existing law, the act of April 28, 1904 (33 Stat., 525), was passed providing that any person or association of persons qualified to make entry under the coal-land laws of the United States who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the District of Alaska may locate the lands upon which such mine or mines are situated, in rectangular tracts containing 40, 80, or 160 acres. Then followed provisions under which these unsurveyed lands might be marked by private survey and the lands as thus identified entered and patented. The price of the land was fixed at the flat rate of \$10 per acre, and substantially the sys-

tem then existing for the ascertainment of homestead and mineral conflicts was provided. Not only was the act upon its face and by its title an amendment of the then existing laws, but section 4 thereof specifically provided:

That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the District of Alaska.

It is urged that section 4 adds nothing to the act; but, even though it be conceded that it would be the duty of the land department and of the courts to read section 4 into the act if it had been omitted therefrom, it is significant that Congress saw fit to add the section, and by so doing it emphasized its will that the act in question should not be held to abrogate or repeal existing law any further than was therein directly expressed.

The Supreme Court in the case of *Blair v. Chicago* (201 U. S., 400), quoted with approval and adopted the rule announced in *People v. Circuit Judge* (37 Mich., 287):

As a rule of construction a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended.

The law as it had been extended to Alaska prior to the date of the amendatory act contained strict provisions preventing one person from securing from the Government more than 160 acres of its public coal lands, an association of two or more persons, more than 320 acres, and four or more persons who had expended in opening and improving a mine the sum of \$5,000 an area not greater than 640 acres. There is nothing whatever in the act of 1904 to indicate that it was the purpose of Congress to depart from its established policy. It proceeded to give relief to the pioneers in Alaska by amending existing law so as to provide a means by which those duly qualified who had opened or improved or who thereafter might open or improve a mine or mines of coal on the public lands situated there, even if unsurveyed, could locate the land in tracts of 160 acres or less and through their own efforts secure the identification thereof in such manner as to permit the claims to pass to patent. It was a well-known fact that while the coal-land laws had been extended to Alaska in all their force and effect, that as a practical question the titles could not be acquired as the lands were not surveyed and the vast extent of that country precluded the possibility that the regular system of surveys could be extended over all that country for years to come. The fact that after providing these special methods by which the patents could be obtained and after reciting that those who made the locations must possess the qualifications necessary to enter coal lands in the United States, it was expressly declared that all the laws not inconsistent with that act should remain in full force and effect, strongly argues that Congress did not intend to remove all

restrictions so as to permit the unsurveyed coal lands in Alaska to be acquired in unlimited quantities. It is inconceivable that Congress intended the lands in Alaska thereafter surveyed should be disposed of under the strict provisions of sections 2347 to 2352 and that the unsurveyed lands might be appropriated without reference whatever to the limitations of said act. If it had been the purpose of Congress to repeal the section of the law aimed at the prevention of monopoly, it could have manifested its will in language that would have left nothing to construction. The policy which governed in the disposition of coal lands had been recognized by the Supreme Court in the case of *United States v. Trinidad Coal Co.* (137 U. S., 160). The limitations in the law had been declared by the land department in decisions too numerous to be cited. The Congress, therefore, understood the construction that had been given the existing acts both by the department whose duty it was to dispose of the lands in accordance with its mandate and by the highest court of the land when called upon to declare the law.

That it was not the intention of the Congress to adopt a new policy with reference to Alaska which would permit the coal lands there to be monopolized is clearly indicated by the reports made to that body prior to the enactment of the law of 1904 and the history of the legislation; and that it was not so understood is shown by the regulations issued by the department for carrying said act into effect under date of July 18, 1904 (33 L. D., 114). In the regulations above mentioned it is said:

Persons or associations of persons locating coal lands in the District of Alaska under this provision of the act are required to possess the qualifications of persons or associations making entry under the general coal-land laws of the United States. And the requirements in this particular are to be found in the coal-land circular approved July 31, 1882 (1 L. D., 687), paragraphs 30 and 31, amended (32 L. D., 382).

Thus it will be seen that the department contemporaneously with the approval of the act construed it to mean that the same qualifications to locate and perfect entries to coal lands obtained in Alaska as in the United States. Moreover, it is provided in the regulations of Commissioner Ballinger, approved by Secretary Garfield, promulgated April 12, 1907:

That persons or associations of persons locating or entering coal lands in the District of Alaska under the provisions of the act of April 28, 1904 (33 Stats., 525), amendatory of the act of June 6, 1900 (31 Stats., 658), are required to possess the qualifications of persons or associations making entry under the general coal-land laws of the United States, and are subject to the same limitations.

And section 5 of said regulations provided:

But one entry of coal lands by any person or association of persons is allowed by the law. No person who and no association any member of which either as an individual or as a member of an association shall have had the benefits of the law may enter or

hold any other coal lands thereunder. The right so to enter or hold is exhausted whether an entry embraces in any instance the maximum area allowed by the law or less.

That Congress did not intend to authorize one person or an association of persons to acquire coal lands in Alaska in unlimited quantities, by the approval of the act of April 28, 1904, is evidenced by the later act approved May 28, 1908, entitled "An act to encourage the development of coal deposits in the Territory of Alaska," because it is provided in the later act—

That all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made location of coal land in the Territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, * * * may consolidate their said claims or locations by including in a single claim, location, or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands not exceeding in length twice the width of the tract thus consolidated.

It would have been idle for Congress to have passed an act permitting the consolidation of claims if under previous law one person could acquire the lands in unlimited quantities. The act of 1908 clearly recognizes that the restrictions and limitations applicable to the United States at that time obtained in Alaska, and the object of the act was to grant relief and provide a means by which these claims could be consolidated and titles thereto acquired by the locators; and that the Congress did not intend to depart from its policy is shown by the drastic antimonopoly provisions in section 3 of the act of 1908.

The Attorney General under date of June 12, 1909 (38 L. D., 86), advised the Secretary of the Interior that a verbal agreement entered into between two or more entrymen prior to the location, that upon the issuance of patent the entries were to be consolidated and mined at the joint expense of each claimant, share and share alike, was unauthorized under the law, and that such agreements were not validated or the locations confirmed by the provisions of the act of May 28, 1908, above referred to.

In the cases of *United States v. Charles F. Munday et al.*, and *United States v. Charles H. Doughton et al.*, decided recently by the United States Circuit Courts for the Western and Eastern Districts of Washington, respectively, there was a difference of opinion expressed by the courts as to the construction to be given some of the provisions of the act of April 28, 1904. The decision in the Doughton case sustained the Government's contention therein, but even though it be conceded that the decision adverse to the Government in the Munday case should ultimately prevail, it is not seen how it would affect the merits of this case. The decision in that case was predicated upon the theory that the several locations were lawful, while in this case it has been specifically alleged and proven that each location was unlawful because prior thereto each of the

several locators had agreed and confederated together that all the land embraced by said several locations should be taken and held for the common use and benefit of all the claimants, a scheme which would permit an association of 33 persons to acquire for the common use and benefit of said association more than 5,000 acres of the public coal lands, whereas the act under which the locations were made authorized an association to secure under its special provisions only 160 acres of such land.

If the act of 1904 be regarded as an independent expression of the will of Congress and as constituting all the law applicable to Alaska coal lands, if the ordinary rules of construction between grantor and grantee be applied, if the policy of the Government to prevent monopoly of its coal land be forgotten, if the contemporaneous constructions of Acting Commissioner Fimple and Acting Secretary Ryan and the subsequent regulations of Commissioner Ballinger and Secretary Garfield be not invoked, if the opinion of the Attorney General and the decision of Judge Rudkin in the Doughton case be not considered, and guided only by the express language of the Congress employed in this act, I could not hold the provision—

That any person or association of persons qualified to make entry under the coal-land laws of the United States who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the District of Alaska may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty (40), eighty (80), or one hundred and sixty (160) acres—

authorized an association of 33 persons to acquire 5,250 acres of the public coal lands situated in the District of Alaska.

THE OPENING OR IMPROVING OF A MINE OR MINES OF COAL.

It is clear from the record that nothing whatever was done to open or improve a mine or mines of coal on any of the following claims, nor was any work done on such claims which could by any possibility be described as a mine: The Lucky Baldwin (Jenkins), entry No. 2; the Lyons (Smith), entry No. 3; the Wabash (Henry), entry No. 4; the Ansonia (Doneen), entry No. 9; the Plutocrat (Johnson), entry No. 10; the Adrian (Mason), entry No. 16; the Cunningham (Sweeney), entry No. 18; the Boston (Page), entry No. 21; the Victor (Baker), entry No. 22; the Rutland (Jos. H. Neill), entry No. 25; the Bozeman (Finch), entry No. 27; the Bedford (Walter B. Moore), entry No. 28; the Calais (Arthur D. Jones), entry No. 29; the Avon (Orville D. Jones), entry No. 30; the Tampa (Warner), entry No. 31; and the Frick (Nelson), entry No. 33.

And the small amount of open cut work performed on each of the following claims was merely prospecting and does not fulfill the requirements of the law: The Lobster (Mullen), entry No. 5; the

Socorro (White), entry No. 6; the Octopus (Dr. John G. Cunningham), entry No. 11; the Maxine (Clarence Cunningham), entry No. 12; the Candelario (Henry Wick), entry No. 14; the Agnes (Hugh B. Wick), entry No. 15; the Clear (Riblet), entry No. 19; the Deposit (Burbidge), entry No. 23; the Carlsbad (R. K. Neill), entry No. 24; the Syndicate (Frank A. Moore), entry No. 32; the Albion (Davidson), entry No. 8; and the Tulare (Miller), entry No. 17.

In the circular approved May 3, 1882, it is provided:

The opening and improving of a coal mine in order to confer a preference right of purchase must not be considered as a mere matter of form.

While in the amended rules promulgated April 12, 1907, reprint July 11, 1908, it is provided:

A preference right of entry accrues only where a person or association of persons severally qualified have opened and improved a coal mine or mines upon the public lands and shall be in actual possession thereof and not by the filing of a declaratory statement. A perfunctory compliance with the law in this respect will not suffice, but a mine or mines of coal must be in fact opened and improved on the lands claimed.

In the case of *McDonald v. Crawford*, unreported, decided March 16, 1907, the department said:

The act of merely clearing the face or surface of an outcrop of coal in order to determine the depth of the coal bed was not the opening and improving of a mine within the meaning of the statute.

It was also held in the unreported case of *Hatop v. Lathrop*, decided April 5, 1907, afterwards cited with approval in departmental decision of March 28, 1909, in the case of *Thad Stevens et al.* (37 L. D., 723), that the mere penetration of a bed of coal by means of a drill so small that the work could not be utilized in the mining of coal from the land is not in itself the opening and improving of a mine of coal thereon within the contemplation of the statute.

In the *Stevens* case it was shown that there had been a number of holes driven by a drill penetrating the coal bed and indicating its thickness. Observing that the drilling of such holes was in fact only prospect work, and that the only effect could be to demonstrate the existence of the coal, its quantity, etc., the department concluded that the work performed was not sufficient to entitle the person doing it to a preference right of entry.

And in the case of *Esther F. Filer* (36 L. D., 360) it was declared:

Substantial steps taken in good faith looking to the creation of an operating and producing mine are essential.

Short tunnels were driven on the Collier (Campbell) entry No. 13; the Adams (Fred Cushing Moore) entry No. 20; the Newgate (Scofield) entry No. 1; and a tunnel of some length was driven into the Ludlow (Miles C. Moore) entry No. 26; while there were several tunnels driven considerable distances into the Tenino (Collins) entry No. 7.

The purposes for which the tunnels were driven were shown by the testimony of Chezum, a witness for the defendants. He testified:

All our work you will understand was in the nature of prospecting * * * to determine the extent of that field, because at that time when we went in there we did not know whether that coal was of commercial quality or not, and it required a great deal of prospecting work to ascertain if it would even justify the payment of the Government price.

And he responded as follows to the questions propounded:

Q. Was there any understanding between you and Mr. Cunningham or anybody else connected with these entries at the time that you were driving these tunnels that they would be ultimately used for mining coal off of any other than the Tenino entry or the adjoining entries?—A. No, sir; in fact, really, that work was not done with a view of mining coal.

Q. It was just prospecting?—A. It was just prospecting.

It is furthermore shown that after the tunnels had been examined by Hawkins, the expert, it was decided to remove the camp from the vicinity of said tunnels to a point on Clear Creek where it was proposed by Hawkins that the mine on the property be opened, that the tunnels were abandoned, and, pursuant to Hawkins' plan, the camp was moved and established on the Avon claim a short distance from the proposed opening of the Hawkins tunnel. Mr. Winchell, when questioned with respect to the development work, stated:

I do not think and do not consider that the whole group of claims present an area at the present time sufficiently developed to justify the expense of building a railroad and wharves and putting up tipples and building residences and putting up power plants for the purposes of operation.

The Supreme Court in the case of *Marvel v. Merritt* (116 U. S., 11) adopted the definition of Webster that a mine is a—

pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging, distinguished from the pits from which stones only are taken and which are called quarries.

The term "mine" when applied to coal is generally equivalent to a "worked vein." (*Westmoreland Coal Co.*, 85 Pa., 344.)

In the case of *Ghost v. United States* (168 Fed. Rep., 841) the Circuit Court of Appeals for the Eighth Circuit considered what constituted the opening and improving of a mine of coal within the meaning of sections 2347 to 2352, Revised Statutes, inclusive. The Government brought an action against Ghost for the alleged conversion of coal which he had taken from the public land of the United States and sold at a time when he was holding the land under a coal declaratory statement, which he subsequently permitted to expire without applying to purchase the land. Ghost apparently did not deny that he had taken and sold the coal, but claimed that the coal was extracted from a prospecting tunnel which he drove to ascertain the extent of the coal measure. The theory of the Government was that a mine of coal had been opened and improved on the tract by a prior

claimant, to whose rights Ghost had succeeded. The trial court directed a judgment in favor of the Government and Ghost appealed. The controlling question, therefore, was whether a mine of coal had been opened and improved on the tract at the time Ghost purchased the possessory rights of the prior claimant. The court through Judge, now Mr. Justice, Van Devanter, stated the case in part as follows:

In January, 1897, Allen M. Ghost purchased from prior possessory claimants a so-called coal mine upon public lands of the United States in Colorado, the purchase including two or three hundred feet of tunnels and shafts theretofore made in an attempt to develop an outcropping vein of coal and various improvements and appliances used in that connection. * * * The so-called mine had then been idle quite a while and was in bad condition, the timber work being down and the tunnel shafts being choked with fallen material. Ghost put these in proper condition, added materially to the improvements and appliances, and extended the development work much further into the earth.

The court noted the regulations that had been issued by the Land Department under the coal land acts, cited a number of decisions bearing thereon, and referred to the action of the court below as follows:

In directing a verdict for the Government the court seems to have proceeded upon the theory that the evidence conclusively established that the original workings which were upon the land when the defendant began his operations constituted a fully opened and developed coal mine within the meaning of the statute; but for reasons before stated we think that theory has little substantial support in the evidence.

The judgment of the court below in favor of the Government was reversed.

If the work of driving the tunnels on the various claims had been steps in the creation of operating and producing mines on said claims, even though it had not progressed to the extent that commercial development was assured, it might be contended that the requirements of the statute had been met as the lands were admitted by the Government to be coal in character, but the tunnels were driven not with the intent of developing operating mines but for the purpose of ascertaining whether the group of claims contained coal in workable quantities and of merchantable qualities.

In conformity with the rule announced by the department in the several cases cited and in harmony with the decision of the Circuit Court of Appeals in the case of *Ghost v. United States* (above), it must be held that a mine of coal was not opened or improved upon any of the claims under consideration.

THE CUNNINGHAM, SURVEY NO. 40, ENTERED BY CHARLES SWEENEY, AND THE VICTOR, SURVEY NO. 38, ENTERED BY W. W. BAKER.

It was held in the *Albert Eisemann* case (10 L. D., 539) that a second declaratory statement can not be filed in the absence of a valid reason

for abandoning the first; and in the case of James D. Negus et al. (11 L. D., 32) the department declared: "One who has had the benefit of a coal declaratory statement is disqualified thereby to enter a second filing;" while in the case of Walter Dearden (11 L. D., 351) the department considered the Eisemann case and in almost identical language approved the conclusions therein reached; and in Conner v. Terry (15 L. D., 310) the earlier cases were reviewed and the doctrine therein announced adhered to.

W. W. Baker having located and filed his declaratory statement for the Belmont claim, survey No. 65, and Charles Sweeney having located and filed his declaratory statement for the Wallula claim, survey No. 63, neither of these gentlemen could abandon the claim located and filed upon and enter different lands without a valid excuse therefor. No explanation whatever is given by Sweeney, while Baker states that Cunningham failed to locate him upon the claim that he desired to enter. As, however, he executed his declaratory statement in blank and left the matter entirely in the hands of Cunningham, he can not now be heard to complain that Cunningham failed to carry out his wishes. He does not charge that Cunningham's failure to give him a claim in the center of the group was the result of fraud or collusion. He swears that he had never seen the deed from Will H. Batting to himself for the Victor claim and that he did not know that such an instrument had been executed. The record does not disclose that there was any conveyance from K. J. Cunningham, the locator of the Cunningham claim, survey No. 40, to Charles Sweeney, further than a note on the abstract of sales that the claim had been so transferred.

As Sweeney and Baker were both disqualified by making the prior locations, filing declaratory statements for the land, and without cause abandoning them, their entries must fail for these reasons if for no other.

DEFECTS APPARENT ON THE FACE OF THE PAPERS.

The locations were all made during the months of July and August, 1904, and no notices thereof were filed in the local office at Juneau until October 10, 1905. Therefore, not one of the notices was filed within the period of one year fixed by the act of April 28, 1904. It is true that the locations of Sweeney, Johnson, Scofield, Mullen, White, Riblet, Henry, Nelson, and Frank Moore were falsely dated, as none of the gentlemen mentioned had joined the association prior to the date of the alleged location, but having through their agent, and Mullen in person as well, given a false date to their locations, they are in no position to say that as a matter of fact said locations were made at a later date or at a time within the year preceding the filing of their declaratory statements and notices of claim with the register

and receiver at Juneau. Furthermore, there is nothing to indicate that said claims were actually located at all, if not at the dates fixed.

November 12, 1906, the President withdrew all the coal lands in Alaska from location, filing, and entry, and by sundry other orders withdrew various bodies of coal lands from filing and entry in the United States; January 15, 1907, he modified the previous withdrawals without specifically mentioning Alaska, as follows:

Nothing in any withdrawal of lands from coal entry heretofore made shall impair any right acquired in good faith under the coal-land laws and existent at the date of such withdrawal.

The Secretary of the Interior, under date of January 21, 1907, promulgated the above order of President Roosevelt and issued instructions thereunder (35 L. D., 395) providing:

Any person seeking to perfect a right alleged to have been existent at the date of the withdrawal must, in addition to the showing now required by the regulations, submit his affidavit or that of his duly authorized agent, setting forth specifically the conditions under which the claim was made and the different steps taken to perfect the same.

Under date of May 16, 1907, the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, issued instructions to the register and receiver at Juneau, Alaska, for the disposition of claims in that office. All the certificates except those of Frank Moore, Nelson, and Warner were issued prior to the promulgation of said instructions, and while the register and receiver presumably acted under the President's order of January 15, as explained in the Secretary's instructions of January 21, they did not require the affidavit showing the several steps taken provided in said instructions. As the notices of location and declaratory statements were not filed in the local land office within the time fixed by the act of 1904, as a claim could not be initiated in Alaska under the provisions of said act by application to purchase, and as the purchase money was not tendered on any of the applications prior to the President's withdrawal, not one of these applications was lawfully allowed, without reference to any charges formally preferred.

In the case of Charles S. Morrison (36 L. D., 126) the department declared:

Unless the declaratory statement is filed within the 60-day period in accordance with the statute, and in which respect its provisions are mandatory, the preference right lapses and leaves nothing to be secured by a declaratory statement thereafter filed notwithstanding no rights in others have intervened.

It is true that on review (36 L. D., 319) the department modified the views expressed above to the extent of holding that sections 2347 to 2352, inclusive, Revised Statutes, under which the case arose, contemplated a total period of substantially 14 months during

which the claimant in the actual possession of a tract who had opened and improved a mine or mines of coal thereon has a preferred right to purchase for the first 60 days absolutely, for the remaining one-year period upon the condition of filing a declaratory statement; that while the applicant in that case failed to file his declaratory statement within the 60-day period, but did file it before any adverse right intervened, and within the 14-month period, the right of the applicant was protected as against a subsequent withdrawal of the land under conditions similar to the withdrawals in Alaska. But here no notice was filed within the year, and a right under the act of 1904 could not be initiated by filing a declaratory statement or by applying to enter.

Two of the entries involved herein, those of Sweeney and Baker, are, as disclosed by the record, illegal for reasons not affecting the others. Each of the 33 entries was improperly allowed because of fatal defects apparent on the face of the papers; and the Government has conclusively established the several charges brought against them. Therefore, coal entries Nos. 1 to 33, inclusive, your series, are held for cancellation subject to the rights of the several entrymen to appeal to the department as provided in the Rules of Practice.

Very respectfully,

FRED DENNETT,
Commissioner.

BOARD OF LAW REVIEW,
By JOHN MCPHAUL.

**INSTRUCTIONS OF THE SECRETARY OF THE INTERIOR TO THE
COMMISSIONER OF THE GENERAL LAND OFFICE AND CORRE-
SPONDENCE BETWEEN THE SECRETARY OF THE INTERIOR AND
E. C. HUGHES, OF COUNSEL FOR DEFENDANT.**

JUNE 21, 1911.

SIR: I transmit herewith copies of correspondence with Mr. E. C. Hughes, attorney for the claimants in the so-called Cunningham cases. Will you see that these papers are filed with the record in those cases and copies transmitted to the parties interested therein, together with your opinion and judgment in the cases.

Yours, truly,

WALTER L. FISHER, *Secretary.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

Under instructions from the Secretary of the Interior, copies of the following correspondence have been filed in the above-entitled cases, and are transmitted herewith to the parties interested therein:

THE NEW WILLARD,
Washington, D. C., May 1, 1911.

DEAR SIR: Hearing in the United States of America *v.* Andrew L. Scofield et al. (the so-called Cunningham cases) has been set before the Commissioner of the General Land Office for May 8. Testimony in these cases was taken in Seattle, Spokane, Paris, Rome, New York City, Cleveland, and Washington City in the order named and was concluded more than a year ago. The record is exceedingly voluminous, and much labor will necessarily be involved in a proper submission of these consolidated causes. The repetition of this labor and the expense incident thereto which would be occasioned by a formal appeal should be avoided, if possible. Moreover, public interest demands as speedy a determination of this controversy as may be consistent with justice and with the orderly dispatch of the business of your department.

Permit me, therefore, on behalf of the claimants, to request that you sit with the commissioner at the hearing, and that either by a separate or a concurring opinion you render a final decision, as upon appeal. The purpose of this request is not to avoid a decision by the commissioner, but to prevent the delay, expense, and labor incident to a formal appeal from the decision of the commissioner and without waiving any rights either upon the part of the Government or the claimants.

Very respectfully, yours,

E. C. HUGHES,
Attorney for Claimants.

HON. WALTER L. FISHER,

Secretary of the Interior, Washington, D. C.

THE SECRETARY OF THE INTERIOR,
Washington, May 1, 1911.

DEAR SIR: Your letter of this date, requesting that I sit with the Commissioner of the General Land Office at the hearing in the so-called Cunningham cases, now set for May 8, has been received and given careful consideration.

I appreciate the importance of a speedy determination of these cases, and of limiting the labor and expense connected with them so far as consistent with the public interests. I can not be sure, however, in advance of the hearing, that the rights either of the Government or of the claimants can be fully protected without the record of a decision by the commissioner and an appeal to the Secretary of the Interior, but I see no reason why your request, that I should sit with the commissioner at the hearing and in some appropriate manner indicate my views as to the correctness of his conclusions, should not

be granted. I shall accordingly arrange to be present at the hearing of the cases on the 8th instant.

Yours, respectfully,

WALTER L. FISHER,
Secretary.

Mr. E. C. HUGHES,
*Attorney for Scofield et al.,
New Willard Hotel, Washington, D. C.*

JUNE 21, 1911.

DEAR SIR: In compliance with your request and my reply to you of May 1, 1911, I sat with the Commissioner of the General Land Office, as you are aware, at the hearing of the oral arguments in the so-called Cunningham cases.

I have carefully considered the printed briefs, the record of the cases, and the opinion and judgment of the commissioner. In my opinion, the findings and conclusions of the commissioner are correct.

This letter is sent you in compliance with our correspondence of May 1, 1911, and is without prejudice to the rights either of the Government or of the claimants.

Yours, truly,

WALTER L. FISHER,
Secretary.

Mr. E. C. HUGHES,
Seattle, Wash.

APPENDIX.

COAL LAND LAWS.

SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

SEC. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving

any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

SEC. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but, when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

SEC. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

SEC. 2351. In case of conflicting claims upon coal lands where the improvements shall be commenced after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

SEC. 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper.

THE COAL-LAND LAWS EXTENDED TO ALASKA.

AN ACT To extend the coal-land laws to the District of Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the public-land laws of the United States are hereby extended to the District of Alaska as relate to coal lands, namely, sections twenty-three hundred and forty-seven to twenty-three hundred and fifty-two, inclusive, of the Revised Statutes.

Approved, June 6, 1900. (31 Stat., 658.)

THE COAL-LAND ACTS APPLICABLE ONLY TO ALASKA.

AN ACT To amend an act entitled "An act to extend the coal-land laws to the District of Alaska," approved June sixth, nineteen hundred.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this act, or within one year from making such locations, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

SEC. 2. That such locator, or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated, an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor, duly approved by the surveyor general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat of survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: *Provided*, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

SEC. 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such

claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

SEC. 4. That all the provisions of the coal land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska.

Approved, April 28, 1904. (33 Stat., 525.)

AN ACT To encourage the development of coal deposits in the Territory of Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made locations of coal land in the Territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions issued by the Secretary of the Interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or locations by including in a single claim, location, or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands, not exceeding in length twice the width of the tract thus consolidated, and for this purpose such persons, their heirs or assigns may form associations or corporations who may perfect entry of and acquire title to such lands in accordance with the other provisions of law under which said locations were originally made: *Provided*, That no corporation shall be permitted to consolidate its claims under this act unless seventy-five per centum of its stock shall be held by persons qualified to enter coal lands in Alaska.

SEC. 2. That the United States shall at all times have the preference right to purchase so much of the product of any mine or mines opened upon the lands sold under the provisions of this act as may be necessary for the use of the Army and Navy, and at such reasonable and remunerative price as may be fixed by the President; but the producers of any coal so purchased who may be dissatisfied with the price thus fixed shall have the right to prosecute suits against the United States in the Court of Claims for the recovery of any additional sum or sums they may claim as justly due upon such purchase.

SEC. 3. That if any of the lands or deposits purchased under the provisions of this act shall be owned, leased, trustee, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever so that they form part of, or in any way effect any combination, or are in anywise controlled by any combination in the form of an unlawful trust, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, or of any holding of such lands by any individual, partnership, association, corporation, mortgage, stock ownership, or control, in excess of two thousand five hundred and sixty acres in the District of Alaska, the title thereto shall be forfeited to the United States, by proceedings instituted by the Attorney General of the United States in the courts for that purpose.

SEC. 4. That every patent issued under this act shall expressly recite the terms and conditions prescribed in sections two and three hereof.

Approved, May 28, 1908. (35 Stat., 424.)

ANDREW L. SCOFIELD ET AL.¹

DEPARTMENT OF THE INTERIOR,
Washington, August 29, 1912.

ANDREW L. SCOFIELD,
FRANCIS JENKINS,
CHARLES J. SMITH,
HORACE C. HENRY,
IGNATIUS MULLEN,
HENRY WHITE,
HENRY W. COLLINS,
FRED C. DAVIDSON,
MICHAEL DONEEN,
FRANK F. JOHNSON,
JOHN G. CUNNINGHAM,
CLARENCE CUNNINGHAM,
A. B. CAMPBELL,
HENRY WICK,
HUGH B. WICK,
FRED H. MASON,
WILLIAM E. MILLER,

CHARLES SWEENEY,
BYRON H. RIBLETT,
FRED CUSHING MOORE,
ALFRED PAGE,
W. W. BAKER,
FREDERICK BURBIDGE,
REGINALD K. NEILL,
JOSEPH H. NEILL,
MILES C. MOORE,
JOHN A. FINCH,
WALTER B. MOORE,
ARTHUR D. JONES,
ORVILLE D. JONES,
W. H. WARNER,
FRANK A. MOORE,
NELSON B. NELSON.

These cases come to the Department on appeal from the decision of the Commissioner of the General Land Office. As appears from the copies of the correspondence appended to the printed copy of the decision of the Commissioner, at the express request of counsel for the claimants I sat with the Commissioner at the hearing of these cases. I read and carefully considered the briefs of counsel for claimants, together with the printed record, and consulted with the Commissioner and his assistants in the preparation of his opinion, in which I concurred, as I stated in my letter of June 21, 1911, to Mr. E. C. Hughes, of counsel for the claimants, in which letter I said:

I have carefully considered the printed briefs and record of the cases and the opinion and judgment of the Commissioner. In my opinion the findings and conclusions of the Commissioner are correct.

I have again reviewed the cases, reading the brief and argument of claimants' attorneys. No new considerations are presented in the argument, although it contains many statements reflecting upon the animus and attitude of the Commissioner which are in my opinion totally unwarranted.

After full consideration, I am of the opinion that the findings of fact and the conclusions both of law and fact of the Commissioner,

¹ See page 176.

as expressed in his opinion in these cases, are correct, and they are hereby adopted as the findings and conclusions, both of law and of fact, of the Department. The decision of the Commissioner in each of said cases is affirmed.

In view of the circumstances as above recited in relation to my participation in the hearing and consideration of these cases, both on this appeal and at the time they were before the Commissioner, the applicants have had a full and fair hearing both before the Commissioner and myself, and, indeed, the consideration by me of this appeal has in all respects also the effect of a rehearing of the case after my own decision. The decision will therefore be carried into immediate effect and the entries canceled.

WALTER L. FISHER,
Secretary.

CONTESTS OF LANDS WITHDRAWN UNDER RECLAMATION ACT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

Washington, September 4, 1912.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Referring to departmental decision of August 24, 1912 (41 L. D., 171), reaffirming, or restoring, with modifications, paragraphs 6 and 7 of the regulations of June 6, 1905 (33 L. D., 607), with respect to contests concerning lands withdrawn under the reclamation act of June 17, 1902 (32 Stat., 388), said sections are hereby amended to read as follows:

Sixth. An entry embracing lands included within a withdrawal, made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest will be awarded a preferred right of making entry. Should the land embraced in the contested entry be within a first form withdrawal at time of successful termination of the contest the preferred right may prove futile for it can not be exercised as long as the land remains so withdrawn; should it be within a second form withdrawal, however, he (the contestant) may make entry under the terms of the reclamation act and should it, at that time, be excluded from all forms of withdrawal he may enter as in other cases made and provided. No contest can be allowed, however, against any qualified entryman who, prior to June 25, 1910, made *bona fide* entry upon lands proposed to be irrigated and who established residence in good faith upon the lands entered by him, for failure to maintain residence or to make improvements upon his land prior to the time when water is available for its irrigation. Successful contestants against entries in second form with-

drawals, reclamation projects, can not be allowed to exercise preference right of entry prior to the time when the Secretary shall have established the unit of acreage, fixed the water charges, and the date when water can be applied and made public announcement of the same. It should be the duty, however, of such contest to keep the local officers advised respecting his residence to which notice may be sent him of his preference right of entry in event of successful contest, and a notice mailed to his address, shown by the records of the local land office at the time of the mailing of the notice of preference right, will be held to meet the requirements of the act of May 14, 1880 (21 Stat., 140).

Seventh. When any entry for lands embraced within a withdrawal under the first form or under the second form, section 5 of the act of June 25, 1910 (36 Stat., 835), is canceled by reason of contest or for any other reason, such lands become subject immediately to such withdrawal and can not thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by successful contestant or any other person, but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry.

Departmental decision of August 24, 1912, is modified and your future action respecting contests will be governed accordingly. So advise the local land officers.

Very respectfully,

SAMUEL ADAMS,
First Assistant Secretary.

ROUGH RIDER AND OTHER LODGE CLAIMS.¹

Decided January 31, 1911.

LODGE MINING CLAIM—DISCOVERY.

The exposure of substantially valueless deposits on the surface of a lodge mining claim, in themselves insusceptible of practical development, but which taken in connection with other established geological and mineralogical conditions in the district lead to the hope or belief that a valuable mineral deposit exists within the claim, does not constitute the discovery of a vein or lodge within the meaning of the law nor afford a valid basis for a lodge location.

PIERCE, *First Assistant Secretary:*

September 12, 1906, J. A. Sherwood filed a separate application for patent to each of the following lodge mining claims: Rough Rider, survey No. 2252; White Horse, survey No. 2253; Red Jacket, survey No. 2254; Cousin Jack, survey No. 2255; Black Joe, survey No. 2258; Last Chance, survey No. 2259; Roosevelt, survey No. 2260; Jennie Gibson, survey No. 2261; Michigan, survey No. 2262; Bright Hope, survey No. 2265; Osceola, survey No. 2255, and Hard Time, survey No. 2257, situate in the Warren mining district, Phoenix land district, Arizona, and entries were allowed thereon December 13 of the same year.

¹ See page 255.

Referring to the foregoing claims, the Commissioner of the General Land Office, by letter of April 23, 1907, advised the local officers as follows:

In his report dated February 28, 1907, Chief of Field Division F. C. Dezen-dorf states that he made a personal examination of each of said claims on January 22, 1907, and found that the development work done thereon consisted of shafts and open cuts made in the softest rock or earth and was practically money thrown away for the purpose of meeting the requirements of the law as to expenditure; that the lands embraced in each and all of said entries is non-mineral in character and that no mineral had been discovered upon any of said claims at date of entry nor at the date of his examination; that said entries were fraudulently made for the purpose of obtaining the lands embraced therein for agricultural and townsite purposes; that prior to making application for patent said J. A. Sherwood sold and deeded said mineral entries to Hoval A. Smith. The Chief of Field Division recommends that said entries be canceled.

By the same letter, the Commissioner directed the local officers to serve notice of such charges, and to proceed in the manner prescribed by the circular of February 14, 1906 [34 L. D., 439].

Denial of each of the charges having been made by Sherwood, a hearing was ordered by the local officers and duly had. Certain depositions were taken November 27, 1908, and the remainder of the testimony was given in April, 1909, before a United States commissioner at Bisbee, Arizona.

December 18, 1909, the local officers found that none of the charges made against the entries had been sustained, and recommended that the protests be dismissed. The Commissioner, however, upon considering the case, found and held that "There has not been made in either of the twelve claims involved a discovery such as would, under the mining laws, support a mineral application for patent, or validate a mining location." The action of the local officers was accordingly reversed, and, for the reason stated, each of said entries was held for cancellation. From this decision the entryman appeals.

The claims are situated from two and three-quarters to three and three-quarters miles in a southeasterly direction from the main portion of the town of Bisbee, and from a quarter of a mile to a mile south of what is represented on the maps prepared by the United States Geological Survey as a probable easterly extension of the Dividend fault.

The Rough Rider, Last Chance, Black Joe, and Cousin Jack claims were located February 9, 1903, and the Red Jacket, April 6, 1903, by J. A. Sherwood, the entryman; the Osceola, January 6, 1903; the Jennie Gibson and White Horse, January 12, 1903; the Hard Time, February 12, 1903, and the Michigan, February 14, 1905, by J. S. Smyth; and the Bright Hope, August 3, 1903, by Fred Colman and John Farley. The above-mentioned claims not located by the

entryman were conveyed to him August 23, 1906. They comprise three separate areas, the largest of which embraces, in the order named from east to west, the Rough Rider, Michigan, Roosevelt, Last Chance, Black Joe, Cousin Jack, Red Jacket, and White Horse. The two smaller areas, one embracing the Hard Time and the Jennie Gibson, and the other the Osceola, lie something less than one thousand feet south of the area first mentioned.

The Bisbee quadrangle wherein the areas are situated is shown to owe its commercial importance exclusively to the occurrence therein of ores of copper, the only other ores therein that have been exploited being an unimportant deposit of sericite, or lead carbonite, that has been worked in a small way, and a siliceous gold ore (at the Easter Sunday mine, situated at a point about two miles east of said areas), which has been used in the Copper Queen smelter for converter lining or ganister. The nearest producing copper mine to the claims in question is the Junction, situated from a mile and a quarter to two miles and a quarter, in a westerly direction therefrom, although a workable deposit of copper is alleged to have been disclosed in the workings connected with what is known as the Denn shaft, situated from a mile to two miles in a northwesterly direction from the land. Operations at the Denn mine, however, have been suspended. It also appears that the workable copper deposits in the Warren mining district occur only at a depth of a thousand feet or more beneath the surface, and that no such deposits have been disclosed at any point south, east, or southeast of the Junction mine.

Witnesses for the Government testify that examinations of the claims made by them after the dates of the entries failed to disclose the existence of any mineral whatever on any of them, or such surface indications as would warrant a man of ordinary prudence in expending his time and means with a reasonable expectation of developing a mine thereon. Chief of Field Division Dezendorf, one of the Government's witnesses, testified in part as follows:

On January 18th, 1907, I, in company with Mr. J. A. Sherwood, representing himself, Hoval A. Smith and the Warren Realty & Development Company, owners of the Warren Townsite, drove to the Warren Townsite property; went to the several claims, he pointing them out to me showing the corners and assessment work, which assessment work on each claim was practically the same with the exception of the Lone Star claim which has situated on it what is known as the Warren Shaft; at that time the Foreman stated that the shaft was down about one-hundred-and-fifty feet. They were working same with a windlass; four men being employed. The formation as disclosed by the dump and what I could see without going down in the shaft was limestone and porphyry; saw some copper stained rock on the dump. The assessment work on these claims, in most instances, was done in the soft places, and in fact Mr. Sherwood, who stated to me that he had charge of and did the assessment, or had charge of doing same for Mr. Hoval A. Smith and the Warren Realty & Development Company, admitted that in most instances they had done the

assessment work in the soft places, in the easiest formation and the easiest places, and so far as developing any mines on that land, which also included his own claims, it was practically money thrown away with the exception of complying with the straight letter of the law as to annual assessment work.

He also admitted to me that on none of those claims embraced in the Warren Townsite or on his own claims had he made any discovery of mineral in rock in place in ledges, lodes or veins, but from the geological conditions of the district it was expected by those whom he represented and on behalf of himself that by deep exploration they would eventually find copper mineral, and he pointed to the fact that in the Junction Mine and in the Denn, where they had gone through conglomerate formation for several hundred feet, and then limestone, and then porphyry, they had discovered mineral at great depth, and shipped same from one or both of said mines, but there were no surface outcroppings of mineral on the land in which those mines were being operated.

On the morning of January 22nd, in company with Mr. J. A. Sherwood, we went to the Warren Townsite, examined the Wash claim and the New Castle; both of them had practically the same surface formation, conglomerate and limestone. The Wash claim takes in the north of the hill and runs into the flat.

We also examined the Rough Rider claims, or at least examined on the ground most of them, but did not examine all of the Roosevelt claim, but Mr. Sherwood said it was not necessary as the workings were done practically in the same manner and in the same formations as the other claims of this group and on those claims we did not examine were the same as those we did examine; he admitted that there had been no discovery of mineral in veins, lodes, or ledges, or otherwise, but that he thought and considered that by deep exploration copper would be found on those lands.

The Wash claim referred to by this witness adjoins the Rough Rider claim on the south, and conflicts therewith to the extent of about half its area. The New Castle adjoins the Wash on the west, the Roosevelt on the north, and the Michigan on the east.

The surface formations of those claims consist, according to the testimony of several of claimant's witnesses, of limestone, conglomerate, or limestone and conglomerate, and containing within the limits of some of the claims, intrusions of porphyry with iron-stained or iron-impregnated contacts; on others, what is termed by the witnesses iron "blowouts"; and on still others, so-called stringers, feeders, ledges, or blowouts of quartz, stained more or less with iron oxide, or impregnated with iron sulphide, and varying in thickness from two to three inches to a number of feet. With respect to the quartz deposits referred to, they testify that about a week before taking the stand they procured samples thereof which assayed, in values per ton, as follows:

	Gold.	Silver.	Copper.
Rough Rider	\$0. 20-----	\$0. 20-----	
Michigan	1. 60-----	. 25-----	
Roosevelt	1. 25-----	. 25-----	
"	trace-----	. 75-----	

	Gold.	Silver.	Copper.
Bright Hope	\$0. 40	none	
Last Chance	trace	\$0. 20	
Black Joe	. 40	. 20	trace
Cousin Jack	. 80		
"		. 20	
Red Jacket	. 20	. 05	
"	1. 20		
White Horse	. 40	. 25	
Jennie Gibson	. 20	. 30	
Osceola	. 20	. 55	
Osceola	trace	. 15	

None of these witnesses, however, claims that the quartz deposits can ever be successfully worked for gold or silver, and some concede that the claims have no value for gold or silver mining purposes. With reference to the ferriferous deposits exposed on the claims, claimant's witnesses all agree that it would be unprofitable to attempt to operate them for iron, and that their only value lies in the fact that, in connection with other conditions disclosed upon the claims, and elsewhere in the district, they afford indications of the existence of other deposits at depth, valuable for copper mining purposes.

J. G. Pritchard testifies that he has lived in the Bisbee district for twenty-five years and has made a study of the geological conditions thereon. He is more or less familiar with the manner in which mining men and mining companies study the formations and the indications they look for in assisting them in determining the location of ore bodies, and is himself in the process of developing some claims lying southeast of the claims here in question. He is familiar, in a general way, with the large faults that cross the country and the formations in which ore deposits are found. They are found in the neighborhood of the Dividend Fault, along its southeast side; at the Cooper Queen mine ore is found at the surface, but at increasing depths to the east thereof; at the Junction, about one and one-quarter miles to the west of these areas it is found at a depth of from 1200 to 1400 feet. Along the line of this fault, mining men are looking for ores to be discovered. Asked to explain the effect that cross faults and slips have on the discovery of ores, he says:

Why, the ore is liable to be more in the line of those cross faults, and we naturally look for those faults to guide us where there is a probability of ore; we can't see into the ground.

Q.—If you should find a cross fault running south of the Dividend Fault on a group of claims in this generally mineralized zone, and would find at the surface of the ground iron croppings with a trace of copper, would you consider that an important place to sink for ore?

A.—That is the only indication that we have to lead to such deposits.

He thinks that under such circumstances a prudent man would be justified in expending his money with a hope of developing a mine. The ore in that district is generally found where the Escabrosa

limestone has formed contacts with porphyry, or where there has been a change in the lime itself.

There are cases where the ore is found in lime that are sometimes filled in; there seems to have been a breaking down of the lime formation and these pockets are frequently filled in from caved faults and it is close to these faults that they occur.

Q.—In that area (which is described, and embraces the claims in question) if you could find a lime with porphyry contact with iron showing and possibly some copper, or even without copper, would you consider it a favorable indication of ore beneath?

A.—Yes, sir.

On cross-examination he testifies that in that district no mineral is found in rock in place in veins, lodes, or ledges on the surface. An area described as lying between the Dividend Fault on the north, the Escabrosa Fault on the south, and east of the Junction mine, within which area these claims lie, is at present an undeveloped country, so far as the production of ore is concerned, and it has yet to be determined whether paying ore deposits exist at depths therein.

John J. Hill testifies that he has been in charge of the sinking of a shaft on the Lone Star claim, situated about 1300 feet south of the Jennie Gibson (the said shaft being 848 feet in depth), and is familiar with the character of the ground lying north and east of the shaft for a distance of from 1000 to 1500 feet. At a point on the McKinley or the McKinley Fraction, which lie to the north of the Lone Star shaft and to the south of the areas in question, he saw mineral indications and copper stain.

They have sunk little prospect holes there where the brick-like porphyry shoves up through the conglomerate in three streaks. Each of these streaks is from a foot to eighteen inches thick and they show quite a bit of copper stain. This point is about 1200 feet from the Lone Star shaft.

Q.—Is that what you consider a valuable mineral showing in this district?

A.—Yes, it shows mineral. I do not know whether you would call it very valuable or not.

Q.—In your opinion, does it show enough mineral to justify a prudent man to develop that ground with a hope to develop a valuable mine?

A.—Well, that is mighty hard to say; they have sunk holes so many places where they have nothing in sight, a man might consider where they have even a stain a good prospect.

The claims referred to are within an undeveloped area so far as producing mines are concerned.

C. T. Winwood testifies that he has worked in the American-Saginaw shaft (situated from half a mile to a mile and a half to the west of the claims) down to a 900 foot level; that at the 600 foot level a drift was run east from the shaft and directly towards the Rough Rider group for a distance of 600 or 800 feet, and in this drift considerable ore was found. An average sample of that ore would probably run from two to four per cent copper, "but you could pick speci-

mens that would go from forty to fifty per cent." In his opinion as a mining man, bearing in mind the relation of the different faults as they occur, and the development on the surrounding claims, a prudent man would be justified in expending money in developing the Rough Rider group and the land adjacent thereto. They generally find copper in that district between lime and porphyry, or between the different limes. There is no mine being operated for copper to the east or south of the Saginaw shaft.

Charles Cunningham testifies that he is engaged in mining, has lived in the Warren district for eight years, and is familiar with the ore deposits therein. He believes that the mineralized zone of the district extends fully a mile east of the shaft known as the Warren or Crescent, situated on the Lone Star claim, which lies a short distance to the south of these areas; that all of the ground lying north of the Gold Hill fault (which is southeast of the claim in question) is in that zone; and that wherever faults break through the lime in that region mineral is liable to be found by sinking.

C. J. Haslam testifies that he is an assayer and mining engineer. He has been in the Bisbee district about five years, and has made a study of the geological formations and deposits therein. He is familiar in a general way with the faults and slips known to the mining men and mining engineers of the district. He defines what he believes to be the mineralized zone of the district, within whose eastern portion the areas in question are situated, and testifies that there is every reason to believe that ore deposition has occurred in that part of the district; that "there is lime in abundance and it is only a case of proving up the formation below the surface and striking a broken up country below where the porphyry and limestone come in along through the faults, which are frequent." In his opinion, not only the main Dividend Fault, but the smaller cross faults, have an important bearing upon the ore deposits of the district, "for the pressure that caused the Dividend Fault and the pressure caused by the intrusion of igneous rocks coming up through there, have caused fractures and fissures almost the entire way at right angles to the general trend of the Dividend Fault, showing that there are great possibilities of existing mineral of possibly great value at depths of these faults." The Saginaw and Denn shafts are sunk on faulted ground and there is another fault to the east of that, running south from the Dividend Fault, and crossing the Rough Rider group. The condition most favorable to the existence of mineral deposits in the district is a lime-porphry contact: "any limestone in any broken up country of cross faults with an intrusion of igneous rocks is a good indication, and a very good showing to sink under, and possibly at great depth you will come into a broken up country in the nature of porphyry and altered limestone, which would warrant your cross

cutting and possibly hitting the body of ore." Nearly all the ore deposits of the district are associated with iron and, in sinking, iron is usually encountered before the copper deposits are reached. He would consider the surface conditions disclosed with respect to these claims favorable to the existence of copper deposits beneath.

L. C. Shattuck testifies that he has resided at Bisbee continuously for twenty-two years and is quite familiar with the mining claims and ore deposits of the district; that he has owned mines and mining claims therein and worked as a miner there for about a year. Asked to describe the manner in which the ore in the mines of that district that have proven valuable generally occurs, the witness said:

The ore occurs here in the form of deposits; some of them are near the surface and some of the ore bodies are at greater depth and are quite deep and these deposits occur in the land along the faulting plains, or along where it has been faulted. Sometimes they occur off of the faults quite a distance from the faults, but I think the faults were the cause of making the ore, besides that there are porphyry sheets where you can't see them; in fact these porphyry sheets occur everywhere in the limestone here where there has been any amount of work done. . . . Sometimes the ore occurs in the hard solid lime, both the roof and the bottom of the ore body being on solid lime, but you find a little fracture or a fissure where there is altered lime and that is the means by which the ore got into this solid lime; but most of the ore occurs in altered zones where the limestone has been altered.

In nearly every instance where valuable ore bodies have been found at depth in the district there is no valuable mineral exposed on the surface. If from the study of the surface of any particular mining claim, and claims adjoining it, witness could ascertain, with reasonable certainty, the character of the formation he would find under that area, and was satisfied that there was within the limits of the claim limestone with a porphyry intrusion, or two different characters of limestone coming in contact, that carried valuable ore deposits, he would consider that a particularly favorable place to sink a shaft, even though there were no mineral, in the strict sense of the term, showing on the surface. He would think also that under such circumstances a prudent man would be justified in sinking with a reasonable hope of finding ore. There are two instances in the district where this has happened, viz: at the Junction and Denn shafts. Inasmuch as ore has been developed at the Junction, Denn, Saginaw, and other mines, on faults that cross, and extend south from, the Dividend Fault, witness would expect to find the same ore bodies on such faults as the one that extends south from the Dividend Fault and crosses the Rough Rider group. He has examined the surface of the Rough Rider group; found there lime, cretaceous lime, quartzite, cretaceous quartzite, and some shale and conglomerate. That formation, taken in connection with the situation of the faults, would indicate to the witness, as a mining man, that that is

a favorable place to sink with a view to developing ore, and that a prudent man would be justified in expending his money there with a reasonable hope of developing an ore body. The surface indications there are a good deal better than those disclosed on the Junction and Denn ground for the reason that on the ground in question the lime is on the surface, whereas at the Junction and Denn the shafts had to be sunk through an overlying formation of considerable thickness before the mineralized limestone was reached.

The important mines of the Warren mining district are situated, according to the report of Professor Ransom (see professional paper No. 21, published by the Geological Survey and offered as evidence herein), in what is known as the Copper Queen block, whose northeasterly exposed limits are from one and one quarter to one and three quarter miles west, south and southwest of the claims in question. The ore deposits within that block, it is stated by Professor Ransom, consist of irregularly shaped tabular or lenticular masses in the Carboniferous (Escabrosa) limestone, and lie for the most part parallel with, but in some cases transverse to, the bedding planes of the formation. Concerning the distribution of such bodies, he says (p. 109) :

The principle bodies of copper ore thus far exploited in the quadrangle are contained within an irregular area of approximately one-quarter of a square mile in extent. This area begins on the north in the heart of the town of Bisbee, and extends south for three-quarters of a mile. It lies northwest of Sacramento Hill and for the most part between the Czar and Calumet and Arizona (Irish Mag) shafts . . . Outside of this limited area no such bodies of copper have yet been discovered, although more or less ore is known to occur in the Lowell, Uncle Sam, White Tail, Wade Hampton, and other mines and prospects.

More particularly describing the boundaries of the productive area he says (p. 141) :

The ore bodies on the whole constitute a broad belt, about 900 feet in width which, beginning (so far as present exploitations show) at a point about 2,000 feet southwest of the Czar shaft, continues northeasterly, chiefly along the southeast side of the Czar fault to the Calumet shaft, thence southeasterly along the southwest side of the Dividend fault, to the contact with the Sacramento Hill porphyry near the hospital. Here the ore belt swings to the south skirting the porphyry mass toward the Spray and the Calumet and Arizona shafts. Whether it continues to skirt the porphyry eastward, past the Gardner and Lowell shafts toward the ice factory and Mule Gulch is yet to be proved by underground work.

The area thus described is situated from two and one-half to three and one-half miles to the west of the claims here in question. Since the date of Professor Ransom's examination (in 1902), but one producing mine—the Junction, situated about a mile and a quarter to the east of the area and in close proximity to a point marking the most southeasterly border of the porphyry mass of which Sacramento Hill is composed—has been developed.

With respect to surface indications of mineral in the district, Professor Ransom, at p. 102 of said paper, says:

Some dark, rusty masses, composed principally of limonite outcrop along the Dividend fault in Bisbee. Similar ferruginous ledges occur in Hendricks Gulch, Queen Hill, and in the limestone south of Bisbee. Experience has shown that such limonitic croppings, although rarely containing appreciable quantities of copper-bearing minerals, are nevertheless frequently, although not invariably, associated with an underlying ore body. They mark the loci of fracturing and mineralization in the limestone. They evidently result from the oxidation of pyrite, the less soluble iron oxide, and some silica, remaining near the surface, while such copper as was originally present has been carried down by percolating solution and redeposited at lower levels. These bodies of limonite, when not too siliceous, are the best surface indications of ore that the district affords. Many of the most important ore bodies, on the other hand, would have remained undiscovered, were surficial phenomena alone relied upon to suggest exploration.

Although the rocks of the quadrangle are seamed with faults and dykes, none of the workable ore deposits occur as ledges or fissure veins. With a few exceptions they are irregular replacements of limestone, originally pyritic, containing probably subordinate amounts of chalcopyrite; they owe their present value to secondary concentrations effected by a process of sulphide enrichment and oxidation.

As to quartz veins in the district, and their importance in connection with copper mining, he says (p. 130):

Quartz varies greatly in abundance in different portions of the ore-bearing ground. A few small veinlets of quartz, carrying pyrite, were observed in the limestone of the 950 feet level of the Calumet and Arizona to have been quartz in exceptional in connection with the cupriferous ore bodies. The mineral, where it occurs at all, usually has the form of fine-grained aggregates that have replaced the calcium carbonate of the limestone or the feldspars of the granite-porphry.

It is manifest from the showing herein made that the mineral-bearing quartz which, it is testified, was found on some of the claims in question, possesses no value whatsoever, either present or prospective, for mining purposes. Indeed, in the brief filed in the case in behalf of the entryman, it is expressly conceded that "the witnesses for the mineral entryman do not claim that the mineral discovered has any actual value in itself, or that mines could be successfully worked for the mineral discovered. The attorneys for the mineral entryman do not make such a claim."

By section 2320, Revised Statutes, it is provided that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

In *Chrisman v. Miller* (197 U. S., 313) the Supreme Court, speaking through Mr. Justice Brewer, said (p. 321):

What is necessary to constitute a discovery of mineral is not prescribed by statute, but there have been frequent judicial declarations in respect thereto. In *United States v. Iron Silver Mining Company*, 128 U. S., 673, a suit brought

by the United States to set aside placer patents on the charge that the patented tracts were not placer mining ground but land containing mineral veins or lodes of great value, as was well known to the patentee on his application for the patents, we said (p. 683) :

"It appears very clearly from the evidence that no lodes or veins were discovered by the excavations of Sawyer in his prospecting work, and that his lode locations were made upon an erroneous opinion, and not upon knowledge, that lodes bearing metal were disclosed by them. It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their destination as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. Although pits and shafts had been sunk in various places, and what are termed in mining cross cuts had been run, only loose gold and small nuggets had been found, mingled with earth, sand and gravel. Lodes and veins in quartz or other rock in place bearing gold or silver or other metal were not disclosed when the application for the patents were made."

This definition was accepted as correct in *Iron Silver Company v. Mike & Starr Company*, 143 U. S., 394, though in that case there was a vigorous dissent upon questions of fact, in which Mr. Justice Field, speaking for the minority, said (p. 412) : "The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral." And again (p. 424) : "It is not every vein or lode which may show traces of gold or silver that is exempted from sale or patent on the ground embracing it, but those only which possess these metals in such quantities as to enhance the value of the land and invite the expenditure of time and money for their development. No purpose or policy would be subserved by excepting from sale and patent veins and lodes yielding no remunerative return for labor expended upon them."

In *Montana Central Ry. Co. v. Migeon et al.* (68 Fed. Rep., 811), Judge Beatty said (p. 814) :

That "a valid location of a mining claim may be made whenever the prospector has discovered such indications or mineral that he is willing to spend his time and money in following it in expectation of finding ore, and that a valid location may be made of a ledge deep in the ground, and appearing at the surface, not in the shape of ore, but in vein matter only," is adopted in *Burke v. McDonald* (Idaho), 29 Pac. 101, and in *Harrington v. Chambers* (Utah), 1 Pac. 375. The last case, on appeal to the Supreme Court, was affirmed, but without discussing this proposition, which was involved in the appeal. 111 U. S. 350, 4 Sup. Ct. 428. It is needless to add to the above other similar definitions. They establish the liberal rule that it is not necessary, to the location of a valid claim under section 2320, that ore of commercial value in either quantity or quality must first be discovered within its limits. While the practical observer will commend the rule, it must be reasonably applied. To apply it to every seam or fissure which may be filled with matter containing traces of the precious metals, whether in or remote from mineral country, whether valuable or worthless as a mining claim, would be a perversion of a liberal law. The vein or lode which the statute directs must be discovered before the location of a claim must be one that, from all its indications, has a present or prospective commercial value, for only "lands valuable for minerals" are subject to appropriation as mining

claims. Section 2318. Hence, in any case, it may be an open question whether a location includes lands valuable for minerals, or whether it is based upon some barren seam or fissure which may be easily found in all localities in which there has been much disturbance of the earth's crust.

To the same effect also is the decision in *Madison v. Octave Oil Co.*, 99 Pac., 176.

In the light of these decisions it must be held that none of the said practically valueless quartz deposits affords a valid or sufficient basis for a mining location.

The ferruginous deposits which, it is testified, outcrop on some of the claims, possess, if anything, even less importance, economically considered, than do the quartz deposits above referred to. They are admittedly insusceptible of practical development for iron, and, so far as disclosed, carry no other mineral in appreciable quantity. But it is, in substance and effect, contended by appellant that these outcrops, taken in connection with other established geological and mineralogical conditions of the district, should be held to constitute such a strong indication of mineral (copper) deposits within the limits of the claims whereon the outcrops occur as to justify the expenditure of time and money, with a reasonable prospect of success in developing a valuable mine thereon; and hence, irrespective of their value, to afford valid bases for mining locations. Considering, however, that the valuable mineral deposits of the Warren district do not outcrop on the surface, but consist of irregular shaped and isolated masses, occurring at great depth and rarely exceeding in horizontal dimensions 150 by 200 feet (see page 136, Professional Paper No. 21, *supra*); and that, so far as shown, no such deposit of workable dimensions has been disclosed at any point to the north, northeast, east, south or southeast of the claims in question, or at any point nearer thereto than the Junction mine, a mile and a quarter or more to the northwest thereof, the Department is of opinion that it is by no means satisfactorily established that the conditions disclosed point with any degree of assurance to the existence of a workable deposit of copper within the limits of any particular one of these claims. But, conceding that the conditions indicate all that is claimed by appellant, a complete answer to his contentions is found in the decision of Judge Ross, in *Nevada Sierra Oil Co. v. Home Oil Co.* (98 Fed., 673), wherein, at page 675 of the decision, it is said:

Mere indications, however strong, are not, in my opinion, sufficient to answer the requirements of the statute, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim. Rev. St., secs. 2320, 2529; *Mining Co. v. Doe* (C. C.) 56 Fed. 685. Indications of the existence of a thing is not the thing itself. . . . Mere indications of mineral, I repeat, do not constitute the discovery of the mineral

itself. If so, a location made upon the discovery of such indications, followed by the proper marking of the boundaries of the claim and the doing of the statutory amount of work within the prescribed time, whether the work resulted in the actual discovery of mineral or not, would entitle the locator to apply for, and upon due proof and payment receive, the government title to the land as mineral land; which obviously would not only be unauthorized by any provision of the statute, but would be in direct conflict with the sections already cited.

And in *Olive Land and Development Co. v. Olmstead et al.* (103 Fed. Rep., 568) Judge Ross said (p. 572):

And in a very recent case of *Nevada-Sierra Oil Co. v. Home Oil Co.* (C. C.) 98 Fed., 673, it was here decided, as it had been many times before by other courts, as well as by the land department of the United States, that mere indications, however strong, are not sufficient to answer the requirements of the statute of the United States relating to placer as well as lode claims, which requires, as one of the essential conditions to the making of a valid location of unappropriated public lands of the United States under the mining laws, a discovery of mineral within the limits of the claim.

To the same effect, also, is the decision in the case of *Miller et al. v. Chrisman et al.* (73 Pac., 1083), wherein the court said (p. 1094):

To constitute a discovery, the law requires something more than conjecture, hope, or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this there may be other surface indications, such as seepage of oil. All these things combined may be sufficient to justify the expectation and hope that, upon driving a well to sufficient depth, oil may be discovered; but one and all they do not in and of themselves, amount to a discovery.

The principles thus expressed find ample support in *United States v. Iron Silver Mining Co.* (128 U. S., 673) and *King v. Amy and Silversmith Mining Co.* (152 U. S., 222).

Under these decisions, therefore, there is no authority for permitting any of the said iron-stained and iron-impregnated outcrops and contacts, which, according to appellant's contentions, as well as the testimony of his witnesses, constitute nothing more than indications of the existence of mineral within the limits of the claims, to be used as the basis for a mining location, and the same is also true with respect to the geological and mineralogical conditions in part relied upon by the claimant to support the locations. The rejection of these features, together with the quartz deposits above referred to, as appropriate bases for the locations in question, leaves the same with nothing whatever in the shape of a discovery to support them. The decision appealed from is accordingly affirmed.

ROUGH RIDER AND OTHER LODE CLAIMS (ON REHEARING).

Decided September 5, 1912.

LODE MINING CLAIM—DISCOVERY.

Country rock in which it is claimed "kidneys" of copper ore may be expected to be found, is not itself a lode within the meaning of the mining laws, and the exposure of such rock within the limits of a lode claim, which may or may not contain mineral, does not constitute the discovery of a vein or lode within the meaning of the law and is not a sufficient basis to support a lode location.

ADAMS, First Assistant Secretary:

The petition for exercise of supervisory power in the above case and the arguments, both oral and documentary, in connection therewith, have been very carefully considered. The only argument presented, that is not sufficiently discussed in the elaborate and learned opinion rendered on appeal from the General Land Office by Secretary Pierce [41 L. D., 242], is that the entire rock formation of the claim in question constitutes a sort of a blanket lode, some thousands of feet thick, in which the "kidneys" of copper ore may be expected to be found. This is, in the opinion of the Department, equivalent to a contention that the country rock itself is the lode, and that, therefore, a so-called discovery of country rock, which may or may not contain any mineral within the limits of the claim, is a sufficient discovery within the meaning of the law. In my opinion such a position seems essentially unsound.

Every other question urged by counsel is, I think, satisfactorily answered in the opinion of Secretary Pierce, mentioned above. See also decision rendered by the Department this day in *ex parte East Tintic Consolidated Mining Company*, Salt Lake City, 03220 [see below].

The petition is denied.

EAST TINTIC CONSOLIDATED MINING CO. (ON REHEARING).

Decided September 5, 1912.

LODE MINING CLAIM—DISCOVERY.

The location of a lode mining claim must be supported by the discovery of the vein or lode within the limits of the claim located; and the exposure of substantially worthless deposits on the surface of a claim, which from observation and geological inference are supposed to indicate that other and unconnected veins or lodes lie at a greater depth, does not constitute a discovery within contemplation of the law, and is not a sufficient basis for a valid location.

ADAMS, First Assistant Secretary:

The petition for rehearing, supported by affidavits, has been carefully considered in this case. Reading this petition in connection

with the prior decision of the Department (40 L. D., 271) makes it evident that patent for these claims is being sought for the purpose of developing supposed deposits of ore—which we may call lodes—well below the surface of the ground, and that there is no claim that the deposits which it is intended to develop have been in fact discovered. The so-called discoveries on the surface of the various claims are supposed to indicate that other and unconnected veins or lodes lie at a greater depth. In other words, in these cases there is an apparent attempt to substitute observation, combined with geologic inference, for discovery. Whatever may be thought of its policy Congress has said in section 2320 of the Revised Statutes: “but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.” Obviously, the words “*the* vein or lode” can only refer to the lode which it expected to develop and mine and cannot refer to disconnected bodies of ore of no possible value in themselves. Congress having laid down this rule for the guidance of the Department, the Department can do nothing but follow the will of Congress in this particular. If the rule is in general, as has been insisted, too narrow a one, or if it does not fit particular localities, obviously the remedy is to be sought at the hands of Congress; and it would be usurpation of authority in this Department to attempt to amend, directly or indirectly, the unmistakable language of the statute.

The question whether before patenting of a lode claim ore must be exposed of commercial value, which is somewhat elaborately discussed by counsel, is manifestly not in point. Any question as to the character of the vein or lode can only arise after the vein or lode on account of which patent is desired has been discovered.

See, also, *Waterloo Mining Co. v. Dee*, 56 Fed., 685; *King v. Amy and Silversmith Mining Co.*, 152 U. S., 222; *Harper v. Hill* (Cal.) 113 Pac. Rep., 162; *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 Fed., 673; *Miller v. Chrisman*, 140 Cal., 440; s. c., 197 U. S., 313.

The petition for rehearing is denied.

TEMPORARY WITHDRAWALS UNDER CAREY ACT.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

Washington, September 7, 1912.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Your letter of August 23, 1912, recommends the modification of section 9 of regulations issued under the act of March 15, 1910 (36 Stat., 237; 38 L. D., 580, 582). With the addition of a direction

for the immediate notation of the restoration upon the records of the local office, your recommendation is approved, and paragraph 9 is amended to read as follows:

Upon departmental approval of an application for temporary withdrawal, the local office will be advised thereof by the General Land Office, and the register will make proper notations upon the records of his office. The one year mentioned in the act as the period of withdrawal will commence to run from the approval of the application by the Department. At the expiration of such year, the Commissioner will advise the local office thereof. Upon receipt by the local office of such advice, immediate notation thereof will be made on the records and the lands withdrawn will be thereby restored to entry, as though such withdrawal had not been made.

Very respectfully,

LEWIS C. LAYLIN,
Assistant Secretary.

HENDERSON T. DIZNEY ET AL.

Decided June 11, 1912.

IMPERIAL VALLEY LANDS—DESERT-LAND ENTRY—ACT OF MARCH 28, 1908.

The act of March 28, 1908, prohibiting desert-land entries on unsurveyed lands, has no application to the lands in Imperial Valley, California, authorized to be resurveyed by the act of July 1, 1902.

ADAMS, First Assistant Secretary:

In 1856, T. 14 S., R. 14 E., S. B. M., was surveyed and upon the plat thereof Sec. 36 was depicted in regular form, containing 640 acres. This township was one of those authorized to be resurveyed by the act of July 1, 1902 (34 Stat., 728), which also provided:

That nothing herein contained shall be so construed as to impair the present *bona fide* claim of any actual occupant of any of said lands to the lands so occupied.

The resurvey of T. 14 S., R. 15 E., was made in November, 1905, and July to December, 1906, and upon the plat thereof one tract of land, rectangular in form, containing 640 acres, was delineated as Sec. 36, T. 14 S., R. 14 E., under the original survey thereof.

In the resurvey made in the Imperial Valley, California, under the above act, the deputy surveyors were given lists of private claims then existing, with instructions to survey them out upon the ground as private tracts, and give them an appropriate number. This list included Sec. 36, T. 14 S., R. 14 E., which apparently had passed from the State of California to one J. E. Scott, under certificate of purchase, No. 15202. This tract of 640 acres was accordingly surveyed out upon the ground and designated Tract 55, and was properly marked by appropriate monuments in 1906, and its location was approved by the Commissioner December 28, 1908.

April 17, 1909, Henderson T. Dizney filed his desert land application, No. 06023, at Los Angeles, California, for lots 13, 14, 31, Sec. 29, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 30, T. 14 S., R. 15 E., according to the resurvey. June 2, 1909, Abe Heiny filed his desert-land application, No. 06495, for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 30, T. 14 S., R. 15 E. June 2, 1909, Tolbert F. Ferguson filed his desert-land application, No. 06496, for lot 32, Sec. 29, and lot 10, Sec. 32, T. 14 S., R. 15 E. Tract 55 embraces parts of sections 29, 30, 31 and 32, under the resurvey and the above applications conflicted in toto therewith. All the applications were rejected by the register and receiver because of this conflict and their decision was affirmed by the Commissioner November 4, 1910, from which action the applicants have appealed to the Department.

Dizney, in his appeal, alleges that prior to March, 1908, the land applied for by him was in possession of one Ross; that he purchased Ross's relinquishment of the alleged right of possession for \$450, whereupon he went into possession and has erected a residence; that he immediately began the work of reclamation, has continuously resided there with his family and made it his home; that he broke the brush upon and leveled and bordered 40 acres, has constructed ditches and purchased 40 shares of water stock; also that he has a crop of barley and corn upon the 40 acres and was preparing the remainder of the land for cultivation.

Heiny, in his appeal, alleged that he went into possession of the land applied for by him about June 1, 1909, built a house, began the work of reclaiming the land, grubbed and cleared about 25 acres of brush and has continuously resided there since June, 1909.

Tolbert F. Ferguson, in his appeal, alleges that he took possession of the land applied for by him May 31, 1909, and began the work of its reclamation; that he had placed about 30 acres in cultivation, has purchased 20 shares of water stock, has erected a house and corral, has fenced two sides of the land which is now ditched and ready for irrigation, has a number of acres sown to alfalfa and has continuously resided there.

From examination of the plats of resurvey, it is at once apparent that practically all of the claims existing prior to the resurvey, were entered and settled according to a private survey, which may be termed the Imperial Survey. It is also apparent that the deputy surveyor followed the location of Sec. 36, T. 14 S., R. 14 E., as defined by such Imperial Survey. The present applicants went into possession of the land long after this tract had been marked out upon the ground as being the property of the State of California, and made their applications and settlements with knowledge of the above facts, or with such facts present as to put them upon notice.

Counsel for appellants claim that rights were acquired under the act of March 28, 1908, prohibiting desert-land entries on unsurveyed lands, and apparently press this claim with vigor. It is obvious that this act has no application whatever to lands in the Imperial Valley, inasmuch as these lands were surveyed lands in 1856 and still remain surveyed lands even though that survey has become largely obliterated. The attempt to make this law apply to a tract set apart in the resurvey of the Imperial Valley is obviously without justification.

The case, as above stated, is in all respects similar to that of Herman H. Peterson, Los Angeles, 090, decided by the Department March 5, 1912, and in accordance therewith the Commissioner's decision is hereby affirmed.

STATE OF OREGON.

Decided July 5, 1912.

SCHOOL LANDS—WHEN TITLE PASSES—RESERVATION.

Title to lands granted for school purposes does not pass to the State until identified by survey, and if at that time included in a reservation, title does not pass until the reservation is vacated and the land restored to the public domain, prior to which event the right of the State is merely expectant, or inchoate, and it has no right or title to assign or convey.

INDEMNITY SELECTION—SHOWING TO SUPPORT SAME.

By an erroneous attempt to sell lands in a school section while embraced in a reservation, the State does not, where it subsequently clears the apparent cloud on the title, forfeit its right to make indemnity selection of other lands in lieu thereof; but in such case it will be required to show that the land is in the same condition as it was at the date of its attempted conveyance.

ADAMS, *First Assistant Secretary:*

The State of Oregon appealed from decision of the Commissioner of the General Land Office of August 31, 1911, rejecting its indemnity school selection for S. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 12, T. 28 S., R. 3 E., Roseburg, Oregon, in lieu of N. $\frac{1}{2}$, Sec. 16, T. 6 S., R. 6 E., within the Oregon National Forest, upon the ground that the State had previously disposed of the base lands, and their repurchase did not make same available to support an indemnity selection.

The township plat of survey was approved April 9, 1895. Before that time, September 28, 1893, the land was included in the forest reserve by executive order. The records of the General Land Office show that the base tract—N. $\frac{1}{2}$ Sec. 16—was assigned by one S. W. Langhorne as base for selections under act of June 4, 1897 (30 Stat., 36), numbers 1967 and 1177, for other land, which selections were rejected by the Commissioner, December 31, 1902, and August 20,

1903, as invalid because the base tracts were reserved prior to survey and never inured to the State.

In support of this appeal, the State submits that:

On the 24th day of May, 1899, the State of Oregon sold to Jessie A. Jones the following described lands: The N. $\frac{1}{2}$ of Sec. 16, T. 5 S., R. 6 E., W. M. These lands were deeded by said Jones to S. W. Langhorne, who used them as basis in making forest reserve selections Nos. 1177 and 1957 under the act of June 4, 1897. These selections were rejected by the Secretary of the Interior for the reason that title to Sec. 16, T. 5 S., R. 6 E., W. M., has never vested in the State of Oregon; said township having been included in a national forest reserve prior to survey. The State therefore conveyed no title to the N. $\frac{1}{2}$ of said section.

In the present case title never passed and the State has not received title for the base land. Section 2275, Revised Statutes, as amended by act of February 28, 1891 (26 Stat., 796), so far as here material, provides that:

if such sections, or either of them, have been or shall be granted, reserved, or pledged, . . . other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken . . . And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, where sections sixteen or thirty-six . . . are included within any Indian, military or other reservation . . . *Provided*, Where any State is entitled to said sections . . . the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. . . . *Provided, however*, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections.

It is clear from this section that title does not pass to the State until survey, nor to reserved lands until the reservation is vacated and the land restored to the public domain. Until such event the right of the State is merely expectant, or inchoate, and though it may stand upon such expectant right and await release of the land from reservation and its restoration to the public domain, it has no title it can convey or right it can assign, and may at any time before vestiture of title relinquish its expectant right by the act of selection of other land as indemnity.

It is true the State improperly sold and assumed to convey to Langhorne, who attempted to use the land as base for selection under act of June 4, 1897 (30 Stat., 36). The selection was properly rejected because the State had no title to convey, and Langhorne had none to relinquish. The State then atoned its fault, and to clear the record of the blot cast by her on title to the land, refunded Langhorne's purchase money and took his reconveyance. Had the State never attempted to sell the land it would be entitled to indemnity selection under section 2275. It has the same right where it has erroneously made a void attempt to convey.

Where, however, the State has attempted to convey, it may properly be required to show that the land is at this time in the same condition it was at date of its void deed. It can not assume to sell lands which it expects to receive title to, and thereby permit them to be denuded of timber constituting the main part of their value, and then claim it has lost the land. The State is permitted to show to the satisfaction of the Commissioner that the land is in the same condition it was at the time of its attempted sale. Otherwise, the decision will stand affirmed.

ALBERT L. KNIGHT.

Decided July 11, 1912.

REINSTATEMENT UNDER ACT OF MARCH 3, 1911—TIMBER AND STONE ENTRY.

Section 1 of the act of March 3, 1911, authorizing the reinstatement of homestead entries canceled or relinquished because of the erroneous allowance of such entries after the withdrawal of lands for national forest purposes, makes no provision for the reinstatement of canceled timber and stone entries.

CONTESTANT—PREFERENCE RIGHT—SECTION 2, ACT OF MARCH 3, 1911.

Section 2 of the act of March 3, 1911, providing that where contests were initiated prior to the withdrawal of lands for national forest purposes the qualified successful contestant may exercise his preference right to enter within six months after the passage of said act, contemplates that a contestant seeking to exercise his preference right under that act shall be qualified as an entryman at the date he makes application to enter, and if then not qualified his application must be rejected, notwithstanding he may have been qualified at the time the preference right of entry was earned.

THOMPSON, *Assistant Secretary*:

Albert L. Knight has appealed from the decision of the General Land Office, dated September 11, 1911, declining to reinstate his timber and stone entry, made on March 5, 1908, of the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ W. $\frac{1}{2}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 4, T. 53 N., R. 62 W., 6th P. M., Sundance, Wyoming, land district.

It appears from the record that Knight was a successful contestant in contest proceedings against a homestead entry embracing the lands above described and that his timber and stone entry was made in the exercise of a preference right secured through said contest. However, the land had been embraced in a withdrawal made on March 1, 1907, and made part of what is now the Sundance National Forest and, for that reason, the entry was subsequently canceled by the General Land Office.

On March 3, 1911. Congress passed the following act (see 36 Stat., 1084) :

That all homestead entries which have been canceled or relinquished, or are invalid solely because of the erroneous allowance of such entries after the withdrawal of lands for national forest purposes, may be reinstated or allowed to remain intact, but in the case of entries heretofore canceled applications for reinstatement must be filed in the proper local land office prior to July first, nineteen hundred and twelve.

Sec. 2. That in all cases where contests were initiated under the provisions of the act of May fourteenth, eighteen hundred and eighty, prior to the withdrawal of the land for national forest purposes, the qualified successful contestants may exercise their preference right to enter the land within six months after the passage of this act.

On July 2, 1911, Knight withdrew the application he had previously made for the return of the purchase money paid by him in connection with said timber and stone entry and filed a motion for the reinstatement of said entry under the provisions of the act above quoted.

In the decision from which this appeal is taken, the Commissioner of the General Land Office held that, if Knight would file a new application under the timber and stone act, he might invoke the provisions of the second section of the act of March 3, 1911, *supra*. The proffered withdrawal of the application for the return of the purchase money paid in connection with his canceled timber and stone entry was held pending the outcome of the action taken in accordance with the Commissioner's decision.

There is no provision made in the act of March 3, 1911, *supra*, for the reinstatement of canceled timber and stone entries, and whatever right Knight may have in the premises is, as was held by the Commissioner, dependent upon section 2 of said act, which contemplates the exercise of the preference right by one qualified as an entryman at the date he makes application, as provided by said section 2. Unless the successful contestant be qualified to do so when he seeks to exercise his preference right of entry, his application must be rejected whatever may have been his qualifications when the preference right of entry was earned. His timber and stone entry for the land was duly and legally canceled, and he has no standing before the Department because thereof, except to the extent that he may be entitled to repayment or credit of the sum paid by him upon the amount hereinafter to be paid, if his present sworn statement, which was filed in connection with his appeal, shall pass to entry in the manner prescribed by the regulations of November 30, 1908, as revised on August 22, 1911 (40 L. D., 238).

The decision appealed from is, accordingly, affirmed and the sworn statement filed with the appeal will be returned to the local office for appropriate action.

OLE C. JORGENSEN.

Decided July 11, 1912.

OKLAHOMA LANDS—FORT SILL WOOD RESERVE.

Lands in the former Fort Sill wood reserve, which were by executive proclamation of September 19, 1906, "opened to settlement and disposition under the provisions of the act of June 5, 1906," are not subject to entry under the general provisions of the homestead law.

THOMPSON, *Assistant Secretary*:

Appeal has been filed by Ole C. Jorgenson from the decision of the Commissioner of the General Land Office, dated October 7, 1911, affirming the action of the local officers and rejecting his application, filed January 26, 1911, to make homestead entry for lots 9, 10, 11 and 12, Sec. 13, T. 1 N., R. 8 W., Indian Meridian, Lawton, Oklahoma, land district, upon the ground that the land is not subject to homestead entry.

The land involved is included in that part of the former Kiowa, Comanche and Apache Indian Reservation known as the Fort Sill wood reserve, which was created by executive order of June 4, 1892, with a view to supplying wood for the soldiers at Fort Sill, Oklahoma. The act of June 6, 1900 (31 Stat., 672, 676, 677, 679), ratified and confirmed a treaty between the United States and the Kiowa, Comanche and Apache Indians, by which the lands in this wood reserve, with other lands, were ceded to the United States. A large portion of the lands so ceded was devoted to allotments in severalty to the Indians. Among the restrictions upon allotment was one to the effect that no person was permitted to select land used or occupied for *military* purposes. In view of this restriction, the lands of the Fort Sill wood reserve were not allotted but were kept intact. A further provision of said act (see page 680) reserved of the lands so ceded the section numbered 13 in each township for agricultural colleges, normal schools and public buildings of the Territory and future State of Oklahoma, with right of indemnity in case of loss of this section from any cause whatever, and it appears that an indemnity selection on account of said lot 12 was approved to the State, February 25, 1907.

The act of June 5, 1906 (34 Stat., 213), directed that the lands in the Fort Sill wood reserve be disposed of for cash as therein provided, but no disposition was made of the land here involved.

June 16, 1906 (34 Stat., 267), Congress passed an act to enable the people of Oklahoma and of the Indian Territory to form a State government, and by section 8 thereof section 13 of all lands which had theretofore or might thereafter be opened to settlement was granted for the benefit of schools and colleges in said State.

By proclamation of the President, September 19, 1906 (35 L. D., 238, 239), it was declared that "all of said twenty-five thousand acres

of land (Fort Sill wood reserve) will be opened to settlement and disposition under the provisions of said act of June 5, 1906."

From the above, it is clear that the land involved is not subject to homestead entry. Whether it passed by the grant of June 16, 1906, to the State of Oklahoma, is not material. That is a complicated question, which need not be decided now; for if the land did pass by that grant, it, of course, belongs to the State, while if by reason of the then subsisting Fort Sill wood reserve, it was excepted from that grant, it must, by the very terms of the act of June 5, 1906, and the President's said proclamation, be disposed of for cash. In any event, it is not subject to disposition under the general provisions of the homestead law.

The decision appealed from is affirmed.

SOUTHERN PACIFIC R. R. CO.

Decided July 11, 1912.

SOUTHERN PACIFIC GRANT—MINERAL LAND.

The discovery of the mineral character of land within the primary limits of the grant made to the Southern Pacific Railroad Company by the act of July 27, 1866, at any time before the issue of patent, will defeat the grant.

DEPOSITS OF PETROLEUM ARE MINERAL.

Deposits of petroleum are mineral within the meaning of the act of July 27, 1866.

CLASSIFICATION AS OIL—PRIMA FACIE MINERAL CHARACTER.

The mineral character of a tract of land within the primary limits of the grant to the Southern Pacific Railroad Company is *prima facie* established by its classification as oil-bearing land; but the company is entitled, upon proper notice and showing, to a hearing to show error in the classification.

ADAMS, *First Assistant Secretary*:

The Southern Pacific Railroad Company appealed from decision of the Commissioner of the General Land Office of April 1, 1911, rejecting its list for Sec. 1 and NE. $\frac{1}{4}$, Sec. 3, T. 31 S., R. 24 E., M. D. M., Visalia, California.

The land is within primary limits of grant to the railroad company by act of July 27, 1866 (14 Stat., 292). Definite location of the company's line was made August 26, 1875. Plat of survey of this township was approved April 1, 1910, but date it was filed in the local office is not shown. The company filed its place list October 20, 1910.

Before such listing, September 21, 1908, the land was withdrawn from agricultural entry under departmental order of September 14, 1908, pending classification by the Geological Survey. June 22, 1909, the land was classified as oil land and the township was in-

cluded in temporary petroleum withdrawal No. 5, October 5, 1909, under departmental order of September 27, 1909, and is now in petroleum reserve No. 2 under executive withdrawal of July 2, 1910. The local office therefore rejected the list and the Commissioner affirmed that action.

The appeal contends that the listed land for more than thirty years has been private land of the railroad company, not subject to withdrawal as public land; that the land has not been returned and does not appear of mineral character; nor is embraced in any exception to the grant made by the act of 1866.

The brief concedes that mineral lands are excepted from the grant, and only two questions are presented by the case: At what time must mineral character be determined; and what is the necessary character of a deposit to be termed mineral within the intent of the act?

Discovery of mineral character at any time before issue of patent will defeat the grant. *Barden v. Northern Pacific Railroad Co.*, 154 U. S., 288, 329-331. As to what is mineral, the court held in *Northern Pacific Railway Co. v. Soderberg*, 188 U. S., 526, 536:

That mineral lands include not merely metalliferous, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture.

It needs no argument to show that deposits of petroleum oil come within that definition of mineral character.

The Secretary was without power to patent the land to the company, for its mineral character excepts it from operation of the grant, and such mineral character is at least *prima facie* established by its classification as oil-bearing land. Nothing herein will preclude the company, upon a proper showing, from right to ask a hearing on proper notice to show error in classification of the land as mineral.

CHARLES L. OSTENFELDT.

Decided July 15, 1912.

COAL LAND APPLICATION—SCHOOL SECTION—PRICE OF LAND.

Where an application under the coal land law for a tract of land in a school section is treated as a contest against the claim of the State under its grant, and the tract as result of proceedings thereon is held excepted from the school grant, and the applicant is permitted to make entry thereof, he will be required to pay the appraised price of the land existing at the time of making such entry, and is not entitled to purchase at the price existing at the date of the presentation of his application.

ADAMS, *First Assistant Secretary*:

December 13, 1909, Charles L. Ostenfeldt filed his application to purchase, under section 2347, Revised Statutes, the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 16, T. 13 S., R. 8 E., Salt Lake City, Utah, land district. The land being within a school section, the register and

receiver advised the State board of land commissioners of the coal application and granted the State thirty days from notice within which to show cause why the application should not be allowed. On January 8, 1910, the State responded, alleging the land to be noncoal in character and to have passed to it under the school-land grant. Hearing was ordered and had and upon the record as made up the Commissioner of the General Land Office on June 6, 1911, affirmed the decision of the register and receiver, dated June 16, 1910, finding and concluding that the land is valuable for its deposits of coal and was so known prior to the admission of the State of Utah. The coal-land application was returned to the local land office for appropriate action.

Thereupon Ostenfeldt proceeded to give notice by publication and posting as required by the regulations, proof thereof being submitted in the letter approved July, 1911. August 10, 1911, applicant paid \$6,000 for 120 acres entered, at the rate of \$50 per acre. Final certificate of entry did not, however, issue until September 8, following report of Chief of Field Division, to whom notice of the application had been sent.

Said section 16, with other land, was withdrawn from coal filing and entry pursuant to departmental order of July 26, 1906. It was classified as coal land by the Commissioner's letter of July 3, 1907, and appraised at \$50 per acre. In Commissioner's letter of March 30, 1911, the land was reappraised as follows: NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE $\frac{1}{4}$ NW. $\frac{1}{4}$ at \$135 per acre and the NW. $\frac{1}{4}$ NW. $\frac{1}{2}$ at \$145 per acre. December 12, 1911, the Commissioner required entryman to pay the difference between \$50 per acre and the valuation fixed in said letter of March 30, viz., \$10,600 or suffer the cancellation of the entry.

Appeal from said decision urges that claimant should be accorded the right to purchase at the price existing when he tendered his application to purchase, and that the delay occasioned by the contest with the State should not be charged against him, and that the subsequent revaluation of the land should not be given retroactive effect as against the rights acquired by and appurtenant to the application to purchase. The argument is predicated upon the theory that such rights were acquired by the application as to involve the United States in an equitable, if not a legal, obligation to sell the land to applicant at the price then fixed, reference being made to departmental instructions of May 20, 1907 (35 L. D., 683), permitting coal declarants who had opened and improved mines prior to withdrawal and valuation to secure the land at the price then applicable, regardless that a higher price may have been later fixed for the land claimed under departmental regulations. The principle of said instructions would be applicable to this case had such an equitable right been acquired by claimant to these lands before the revaluation. However, it appears from the records of this Department that the survey

of said section 16 approved by the surveyor-general June 30, 1896, did not specifically return the lands here involved as coal lands, nor does it appear from the evidence before the Department that any claim thereto under the coal-land laws was at that date asserted by claimant or others. Presumptively, therefore, the title to said land passed to the State of Utah, and this presumption could be overcome only by the submission of a satisfactory showing to the contrary. Until such showing had been submitted and a finding made upon the question involved, no application or entry could be allowed of record for the land (32 L. D., 39 and 117). An application to contest the claim or right of the State might be entertained and the application to purchase of Ostenfeldt was so treated, resulting, after answer and denial by the State, in a trial and the final holding by the Commissioner, June 6, 1911, that the lands did not pass to the State of Utah at date of approval of survey or at all, because of their known coal character. From and after this adjudication the lands became subject to application and entry under the coal-land laws but at the price then fixed under the regulations of the Department. No rights were obtained by Ostenfeldt when he tendered his application to purchase, December 13, 1909, he occupying merely the status of a would-be contestant, without the privilege, sometimes extended by statute, of a preference right of entry in event of success. Even in those instances the successful contestant is only accorded a right to enter subject to the conditions existing at the time the right becomes available. After the records had been cleared of the claim of the State he, if the first qualified applicant, might enter the land if subject to disposition, but at the price, and subject to the conditions, then fixed. His entry may be allowed to stand only upon the payment of the price fixed and applicable June 6, 1911, and the decision of the Commissioner is accordingly affirmed.

CHARLES L. OSTENFELDT.

Motion for rehearing of departmental decision of July 15, 1910, 41 L. D., 265, denied by First Assistant Secretary Adams, September 19, 1912.

HENRY W. FARRANT ET AL.

Decided July 13, 1912.

OKLAHOMA PASTURE LANDS—EXTENSION CHARGE—INTEREST.

The extension charge of five per cent authorized by the acts of March 11, 1908, and February 18, 1909, for extension for one year of payments on purchases of Oklahoma pasture lands under the act of June 28, 1906, is in lieu of interest for the year covered by the extension; and there is no authority for also charging interest during that period or for considering such extension charge as interest.

COMPUTATION OF EXTENSION CHARGES.

Extension charges under the acts of March 11, 1908, and February 18, 1909, should be computed on the aggregate amount of the deferred payment and the interest thereon, and not on the deferred payment alone.

DEFICIENCY IN INTEREST PAYMENTS.

Any deficiency in payments on account of interest on deferred payments, due at the date of the act of April 27, 1912, is subject to division and extension under the provisions of that act.

DEFICIENCY IN EXTENSION PAYMENTS.

Any deficiency in extension payments made under the acts of March 11, 1908, and February 18, 1909, is a debt due and is not subject to extension, nor is interest chargeable thereon; and payment thereof must be made within thirty days from notice, on penalty of cancellation of the entry.

ADAMS, First Assistant Secretary:

Appeal is filed by Frances M. Troutman from decision of October 21, 1911, of the Commissioner of the General Land Office requiring payment, within thirty days from notice, of a stated interest deficiency of \$125.41 in final payment May 26, 1911, on the purchase made November 6, 1906, by Henry W. Farrant, assigned to said Troutman, under the act of June 28, 1906 (34 Stat., 550), for the SW. $\frac{1}{4}$, Sec. 4, T. 1. S., R. 8 W., I. M., Lawton, Oklahoma, land district.

It appears that the appraised value of these lands is \$1,600, one-fifth of which, or \$320, was paid on the date of the purchase, as provided in said act; one-fourth of the remainder of the purchase price falling due, with interest at the rate of six per cent per annum, each year thereafter, as also provided in that act.

The amount falling due November 6, 1907, was not paid, and on August 28, 1908, payment of \$16 was made for an extension of one year on such amount, under the provisions of the act of March 11, 1908 (35 Stat., 41).

No payment also was made of the regular installment, with interest thereon, or of the above mentioned extended amount falling due November 6, 1908, but on October 15, 1909, payment of \$34.93 was made for an extension also of one year on these amounts, pursuant to the provisions of the act of February 18, 1909 (35 Stat., 636); and on December 12, 1909, payment of the regular installment, with interest thereon, and of the two above mentioned extended amounts all falling due November 6, 1909, not having been made, payment of \$52.80 was made for one year's extension on these amounts then due.

On May 26, 1911, payment was made of the entire remainder of the purchase price, \$1,280, and of \$109.56 interest as in full, and final certificate was issued accordingly.

In the decision appealed from no reference is made to the above extensions made herein, but the computations of payments due are made as under and controlled by said act of June 28, 1906, and the act of March 26, 1910 (36 Stat., 266), and the regulations issued under

the latter act (38 L. D., 545), and interest is computed therein accordingly at the rate of 6 per cent per annum, as fixed in the former act, on the principal of each installment to the date it fell due and at the rate of 5 per cent per annum, as fixed in the latter act, from that date to May 26, 1911, when final settlement was undertaken to be made; deducting from the total interest thus found to be then due the aggregate of the above-mentioned extension and final interest payments made, classing all, however, as interest payments, and thus leaving the stated deficiency of \$125.41.

This method of computing, however, while producing an approximately correct result, the extension charge being the same rate as the interest rate fixed by said act of March 26, 1910, is wrong in theory and confusing, as it does not purport to or in fact consider the extensions but computes interest over the period covered by such extensions, contrary to the provision of the act of February 18, 1909, *supra*, that the extension charge shall be in lieu of interest for that year. While this provision is not contained in the act of March 11, 1908, *supra*, under which the first extension herein was made, it is not believed that this remedial legislation was intended to add to, in any respect, while undertaking to relieve the burdens existing in this class of cases, and that such extension charge under that act was intended to be in lieu of interest for the year of the extension.

It appears also that the extension payments herein were not made in advance, as required by said extension acts, but by the instructions of June 24, 1909 (38 L. D., 50), it was held that such delinquent purchasers will be deemed to have intended to avail themselves of the relief afforded and will be required to pay the per centum fixed by the law.

Interest at the rate of 6 per cent per annum, as provided by the act of June 28, 1906, *supra*, was properly computed on each deferred payment to the date it fell due. The amounts thus respectively falling due originally November 6, 1907, November 6, 1908, and November 6, 1909, viz., \$339.20, \$358.40, and \$377.60, and severally extended under said acts of March 11, 1908, and February 18, 1909, thus finally fell due, with the last installment amounting to \$396.80, on November 6, 1910, the aggregate of principal and interest then falling due being \$1,472, payment of which was extended, by the express provisions of said act of March 26, 1910, one part of the amount falling due November 6, 1911, and the remaining three parts annually thereafter, with interest at the rate of 5 per cent per annum from November 6, 1910; the purchaser being allowed, however, to make final proof and payment at any time after five years from date of the entry and within such extension period. (Regulations, *supra*.)

Interest on the amount of the deferred payments, \$1,472, from November 6, 1910, to May 26, 1911, six months and twenty days, instead

of six months and twenty-one days as computed in the decision appealed from, is \$40.89, making \$1,512.89, principal and interest, then payable on settlement.

Errors, however, appear to have been made in the extension payments herein. The first payment of \$16 was evidently computed on the basis of the principal, \$320, then due, only, while it should have been computed on the principal and the interest amounting to \$339.20, the extension payment on which would be \$16.96, making a deficiency in that payment of 96 cents.

The next extension payment, for the year beginning November 6, 1908, should have been computed on the amount then regularly falling due, \$358.40, and the amount extended from November 6, 1907, \$339.20, aggregating \$697.60, making the proper extension charge for that year \$34.88, or 5 cents less than that paid.

The next extension payment for the year beginning November 6, 1909, should have been computed on the amount then regularly falling due, \$377.60, and the last extended amount, \$697.60, aggregating \$1,075.20, making the proper extension charge for that year \$53.76, or 96 cents more than was paid.

Adding to the amount of principal and interest to May 26, 1911, as above computed, \$1,512.89, the balance thus due from this purchaser on the extension account, \$1.87, makes \$1,514.76 as the total then payable for final settlement, leaving the deficiency \$125.20, after the payment then made of \$1,389.56, of which deficiency \$123.33 is on interest account and \$1.87 on extension account.

This deficiency on interest account being due, under such settlement, it comes within the provisions of the recent act approved April 27, 1912 (Public, No. 134), which directs the Secretary of the Interior to subdivide each of the deferred payments on lands theretofore sold under said act of June 28, 1906, into two parts, one of which shall be paid annually thereafter until all are paid, and provides further:

That all interest due on such deferred payments on the date of the passage and approval of this act shall be added to the principal, become a part thereof, and, together with all deferred payments, bear interest at the rate of four per centum per annum until paid.

In accordance with this provision, the interest deficiency on final settlement herein, \$123.33, will be divided into two parts, one of which will be due and payable in one year and the other in two years from April 27, 1912, with interest from that date at the rate of 4 per cent per annum until paid.

Said extension deficiency of \$1.87 is a debt due which does not come within the purview or operation of any of said extension acts, nor is interest thereon chargeable nor deferment thereof authorized by any of said acts involved herein. This amount should be paid

within thirty days from notice of this decision, subject to cancellation of the entry if not so paid.

The final certificate herein is canceled, and the case is remanded for action in accordance with the foregoing.

JAMES DEERING.

Decided July 17, 1912.

NORTHERN PACIFIC ADJUSTMENT—SELECTIONS UNDER ACT OF JULY 1, 1898.

Selections under the exchange provisions of the act of July 1, 1898, based upon *uncompleted* claims relinquished under that act because in conflict with the grant to the Northern Pacific Railway Company, must in every instance be confined to one transaction and to lands in a compact body in one land district, but selections based upon *completed* claims relinquished under that act need not be confined to a single transaction and may embrace noncontiguous tracts in different land districts.

ADAMS, *First Assistant Secretary*:

By decision of January 11, 1911, the Department considered a selection proffered March 25, 1910, by James Deering, under the act of July 1, 1898 (30 Stat., 597, 620, 621), for a tract of unsurveyed land which, when surveyed, it was said, would be described as the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 1, T. 11 N., R. 32 E., Blackfoot land district, Idaho.

This was one of four several selections for forty acres, each made by Deering, in four different land districts, Blackfoot 07622, Boise 06368, Lewistown 08207, and Glasgow 07533, in lieu of 160 acres embraced in a cash entry under the act of September 29, 1890 (26 Stat., 496), and to which he therefore had full equitable title and which had been relinquished by him under the exchange provisions of said act of July 1, 1898.

The Commissioner of the General Land Office had by his decision of October 21, 1910, held these selections for cancellation upon two grounds: (1) that in the administration of the act of July 1, 1898, under the rule established by the General Land Office, while an individual selection may embrace noncontiguous tracts, the party accorded the right of selection is restricted to one selection based on the same right or claim and to the selection of lands within one land district; and (2) because the selection did not contain a description of the land by metes and bounds with courses and distances by which the location of the tracts on the ground can be readily and accurately ascertained, as required in the selection of unsurveyed lands by circular of November 3, 1909 (38 L. D., 287).

Upon the appeal from that decision it was admitted that the selection had not been made in accordance with law and subsisting regulations in that it did not sufficiently describe the land, and, noting this admission, the Department in disposing of the appeal, which went to

the Commissioner's action upon all the selections, affirmed so much of that action as imposed the requirement of more accurate description but declined to pass upon the question of the right to make the selections in different land districts, it being conceived that the selector might refuse or fail to comply with such requirement and that a decision upon the further question might not be necessary.

Under date of October 26, 1911, the Commissioner of the General Land Office, resubmitting the case, reports that the selector has complied with the requirement as to identification of the land; that the further question of description has now arisen and must be met, and, after referring to the cases of Emil S. Wangenheim (28 L. D., 291); James A. Bryars (34 L. D., 517); William M. Slusher (38 L. D., 326); and William R. Fox (39 L. D., 318), again expresses the opinion that the selector is restricted to one selection and to the selection of lands within one land district, but invokes the further consideration of the Department and advice upon this question.

The case of Fox, *supra*, decided by this Department October 26, 1910, involved a selection under said act of July 1, 1898, at Seattle, Washington, which had been held for cancellation by the Commissioner of the General Land Office upon the ground that Fox had theretofore made a selection in full satisfaction of his right, at Vancouver, Washington. It appeared that Fox had relinquished a portion of the Seattle entry because of the claim and contest of a prior settler. In the location of the portion of his claim thus remaining unsatisfied, he theretofore had proffered a selection in a different land district from that in which the original selection had been made, and the Commissioner of the General Land Office, invoking the practice upon which his present views are predicated, had held that such selection could not be allowed because of this fact.

In said departmental decision in that case, reversing the decision of the Commissioner, after reviewing the cases hereinbefore cited, it was said:

The effect of the determination in all these cases is that a completed claim may be transferred to noncontiguous tracts, provided it is confined to one transaction and to land in the same land district.

In none of them, however, is the reason of the rule laid down, which, it is conceived, is one of administration only. There is nothing in the law specifically prohibiting the location of the unsatisfied balance of a supplemental claim of the character here in question upon lands situate in a district other than that in which the original selection was made, and no reason, other than one of administration, is suggested as to why the entry should be confined to the same land district. This being true, under the facts of this case the rule must give way. The land originally selected by the claimant was in a compact body, and all the land covered thereby was in the same land district. He had complied with the letter of the rule of administration, and it was through no fault of his that he was not enabled to perfect his claim. He lost forty acres of the claim because of the unforeseen circumstance that it was covered by the

prior homestead claim of another. Rather than dispute the priority of this claim, he elected to relinquish the same and perfect title to the remainder. It is not believed that this action operated to satisfy his right under the law, and, inasmuch as he must make another entry to fully satisfy such right, it is not perceived what difference it makes, either as a principle of law or a rule of administration, whether such additional or supplemental entry be made in the Seattle land district, or elsewhere.

A review of the cases cited clearly shows that the precise question here presented was not involved in any of them. The Wangenheim case involved an exchange of land under the act of June 4, 1897, and a selection thereunder of noncontiguous tracts, was sustained, they being *in the same land district*. The case of Bryars involved the exercise of the exchange privilege accorded by the act of February 24, 1905 (33 Stat., 813), and the beneficiary was allowed to make a second homestead entry of noncontiguous tracts, such lands being within the same land district. The case of Slusher involved a construction of the act of July 1, 1898, and a selection of noncontiguous tracts was allowed, but it was held that the exercise of such right should be "confined to one transaction and to lands in the same land district."

The decision in the Fox case, as shown, went further than any of these and abrogated the rule of administration which had theretofore obtained, confining selections of this character to the same land district. Admittedly this was upon the special facts of the case, but it is significant that it was noted in the decision, as basis therefor, that the act of July 1, 1898, does not in terms or by necessary implication prohibit location of the unsatisfied balance of a supplemental claim of the character there presented upon lands situated in a district other than that in which the original selection was made.

Obviously, as matter of law, if this could be done under the circumstances presented in that case, then, as matter of administration, whatever of administrative objection there may be to such rule, the rule may be extended to any case of selection under the same act, upon the basis of a completed claim. In principle, the practice which has heretofore obtained is open to serious objection. The act of July 1, 1898, makes provision for two classes of beneficiaries: one, the individual claimant, and the other the railway company. In actual practice the railway company has always been permitted to assign as basis for a given selection part of a quarter section of land relinquished under said act and to assign other portions of the same quarter section in support of selections in other and different land districts. This practice has never been questioned. A reading of that act shows that the privilege accorded the railway company is no other or different from that accorded the individual. There being no difference in law, fair dealing demands that there should be none invoked in

administration. This is true, however, only in the case of a completed claim upon the lands relinquished as basis for the exchange. If such claim has not been completed the act requires compliance with the law under which it was initiated, and if it rests upon a settlement, proof may only be made upon the selected land, as provided "in other cases," but with credit for residence and improvement upon the land so relinquished. It necessarily results that in the case of uncompleted claims the lands selected must be in a compact body, because the law under which the claim is to be perfected may require the performance of such acts as may only be performed upon contiguous lands.

It is perceived that a change of practice, as herein indicated, may impose some extra burdens upon the General Land Office and may, in some instances, result in duplication of selections, but with proper care this ought to be avoided. The case is remanded for proceedings not inconsistent with this decision.

PRACTICE—CONTEST—RULE 14 AMENDED.

RULES OF PRACTICE.

DEPARTMENT OF THE INTERIOR,
Washington, July 24, 1912.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: The Department has received your letter of May 23, 1912, with reference to the amendment of Rules 8 and 14, of the Rules of Practice, made in the Department's decision of March 11, 1912, in the case of *Armstrong v. Matthews* [40 L. D., 496], and suggesting an amendment of said Rule 14 so as to limit the time for filing by a contestant of a motion for a judgment by confession.

Upon consideration of the matter, said amended Rule 14 is hereby amended to read as follows:

RULE 14. Upon the failure to serve and file answer as provided by rule 13, the allegations of the contest affidavit will, on motion of contestant made within twenty days after the date the answer is required to be filed and before any answer is filed, be taken as confessed, or in case of failure of contestee to file answer and of contestant to file motion within the time prescribed, the allegations of the contest affidavit may be taken as confessed and judgment entered by the Commissioner of the General Land Office without the award of preference right to contestant. Due service of notice, either personally or by publication, as provided by rule 8, must appear in all such cases. At the end of the period herein prescribed the register and receiver will forthwith forward the case with recommendation thereon to the General Land Office, and notify the parties by registered mail of the action taken.

Very respectfully,

SAMUEL ADAMS,
First Assistant Secretary.

RICHARDSON v. WILSON ET AL.*Decided July 25, 1912.***CONTEST—COAL DECLARATORY STATEMENT.**

Upon the timely presentation of an application to purchase coal lands the declaratory statement theretofore filed by the applicant becomes *functus officio*, so far as strangers to the land are concerned, and can not thereafter be made the object of contest proceedings.

COAL DECLARATORY STATEMENT AND APPLICATION TO PURCHASE—CONTEST—PREFERENCE RIGHT.

Neither a coal declaratory statement nor application to purchase is an "entry" within the meaning of the act of May 14, 1880, and no preference right of entry can be secured by contest against the same.

ADAMS, First Assistant Secretary:

This is an appeal by P. C. Richardson from the decision of the Commissioner of the General Land Office of June 11, 1910, rejecting his application to contest the following coal declaratory statements, filed February 27, 1901, for land situate in T. 14 N., R. 1 W., W. M., Vancouver land district, Washington: No. 507, filed by Kate Roberts Wilson for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 10; No. 508, filed by Minn Marie Wilson for the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 10; No. 509, by James R. Winston for the NW. $\frac{1}{4}$ Sec. 14, and No. 511, by Salomon Lauridson and Henry Kamps for the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$, Sec. 4.

It appears that, by letters of October 27, 1904, the Commissioner, referring to said declaratory statements, notified the local officers, in each case, as follows:

On July 22, 1904, Special Agent H. B. A. Ferguson reported that he had made a personal examination of said case and found that this filing was not made for the exclusive use and benefit of said claimant, but in the interest of the Sterling Coal Company, a corporation organized under the laws of Oregon.

The "said filing" was therefore suspended and the local officers directed to issue notices in accordance with instructions contained in circular of August 18, 1899 (29 L. D., 141).

Notices of the said suspension and charges were duly served upon the claimants who, on December 31, 1904, denied the charges and asked for a hearing. Hearings were set for March 29, 1905, but, later, continued to October 16, 1905. Before the date last mentioned, however, the hearings were indefinitely postponed to await the determination of two suits instituted by the Government against Watson Allen and others to annual patents issued upon two coal entries for land in the vicinity of the tracts here in question, in which suit the original papers in the present case were desired to be used as evidence. These suits have since been finally determined in favor of the Government but no new date appears yet to have been set for the hearings heretofore ordered.

Prior to the institution of said proceedings by the Government, hearings had been ordered and had as between the foregoing coal declarants and certain persons asserting claims to the land under the provisions of the timber and stone law and in connection with and as a part of said proceedings, each of the coal claimants applied, in January, 1902, to make entry of the land. These cases were ultimately decided in favor of the coal claimants and closed March 20, 1905.

By departmental orders of July 26 and October 10, 1906, as later amended, the tracts above described were withdrawn from coal entry for examination and classification with respect to coal values, and these orders were, by executive order of July 7, 1910, ratified and confirmed, and the land further withdrawn for the same purpose, under the provisions of the act of June 25, 1910, and have not yet been classified.

May 7, 1910, the aforesaid P. C. Richardson filed in the General Land Office a petition setting forth, in substance, the same charges as those contained in the report of Special Agent Ferguson, upon which the proceedings of the Department were instituted. In said petition, Richardson alleges that he had furnished the land department with the data upon which said report and charges were predicated and requested that he be permitted to "contest the aforesaid declaratory statements under the provisions of section 2 of the act of May 14, 1880 (21 Stat., 140)."

The Commissioner, in the decision appealed from, conceded that the evidence upon which the proceedings instituted by the Government were based was furnished by Richardson, and that he was not only able to but did supply the principal evidence upon which the patents for the land involved in the suits, above mentioned, were vacated, but held that, owing to Richardson's connection, as secretary, with the Sterling Coal Company, in whose interest the claimants are charged with having filed their declaratory statements, it would be inadvisable to yield the precedence of the pending proceedings in favor of that proposed to be instituted by Richardson. For this reason, the application of Richardson to contest the declaratory statements was rejected.

It appears that Richardson's application to contest the declaratory statements is filed with a view to the securing of a preference right to enter the land in question, or a portion thereof, in the event of success.

The contest affidavit is directed solely and specifically to the declaratory statements filed by the coal claimants. It is to be observed, however, that the declaratory statements were followed by the timely presentation of applications to purchase, which have not yet been acted upon, first, because of the proceedings between the coal claim-

ants and the timber and stone claimants for the same land which, as above stated, were not finally closed until March 20, 1905, and, second, because of the pending charges against the claims filed in 1904 by the special agent.

A coal declaratory statement is a filing required to be made by a person who, having acquired preference right to make entry of a particular tract of the public coal land, by the opening and improving of a mine of coal thereon, seeks to preserve such right beyond a period of sixty days next succeeding the date upon which the right accrues. It does not and can not of itself initiate any right to a tract, but merely preserves and continues a preference right of entry, already acquired, for an additional period of twelve months. *McKibben v. Gable* (34 L. D., 178) ; *Lehmer v. Carroll et al.*, on review (34 L. D., 447). Such a filing, therefore, ceases upon the timely presentation of an application to purchase, presented by the declarant, to have any office to perform, except in so far as it must needs be invoked as against a departmental withdrawal of the land, or rights alleged to have been initiated by an adverse claimant, during the preference right period. As to all strangers to the land, the declaratory statement becomes, upon the presentation of an application to purchase, *functus officio*.

No claim under the coal land laws, adverse to the applicants herein, appears to have ever been asserted to the tracts above described or any portion thereof, by Richardson or any other person, and no withdrawal of the land was made by the Department until more than a year after the said applications were filed. The declaratory statements, therefore, have long since ceased to have, for any practical purpose, any vitality. Moreover, the preference rights, of which the declaratory statements were but *prima facie* evidence, became, upon the filing of the applications to purchase, completely merged in, and satisfied by, the latter filings, if such asserted rights ever had any legal or valid existence. It is clear that substantially defunct declaratory statements, such as these, can not be made the object of contest proceedings.

Furthermore, even if Richardson should be permitted to proceed with the proposed contest and, as a result, should show that not only the declaratory statements but the applications were filed in the interest of some person or persons other than the declarants and applicants and, on that account, defeat the filings, he would not thereby secure a preference right to enter the land, or any portion thereof, under the act of May 14, 1880 (21 Stat., 140), for neither a declaratory statement nor an application is an entry or an equivalent thereof within the meaning of said act which accords a preference right of entry only to one who contests, pays the land office fees, and procures the cancellation of an entry. *Jacoby v. Kubal et al.* (29 L. D., 168) ; *Todd v. Hays*, on review (34 L. D., 371) ; *Bowlby v. Hays* (id., 376).

For these reasons, the application to contest said declaratory statements will stand rejected. The judgment of the Commissioner is accordingly affirmed.

DeLONG v. CLARKE.

Decided August 3, 1912.

FOREST LIEU SELECTION—ADVERSE OCCUPANCY.

A forest lieu selection invalid because allowed for lands adversely occupied at the date of the selection is not validated by the subsequent abandonment of the lands by the occupant.

FOREST LIEU SELECTION OF UNSURVEYED LAND—PROTEST.

The Commissioner of the General Land Office is without authority to receive and pass upon proof to support a forest lieu selection of unsurveyed lands until the plat of survey of the township has been accepted by him, and his approval of a selection of unsurveyed lands confers upon the selector no equitable title; but where the selection is still of record at the date of the filing of the township plat, and the selector thereupon adjusts his selection thereto and submits the same for final approval, such submission is in effect a reselection, and the land department may permit the selection to be perfected as of that date, notwithstanding an intervening protest against the same charging that the lands were occupied at the date of the original attempted selection.

PROOFS TO SUPPORT SELECTION—RIGHTS ACQUIRED BY SELECTION.

Paragraph 18 of the regulations of July 7, 1902, requiring that "all papers and proofs necessary to complete a selection must be filed at one and the same time, and until they are presented no right will vest under the selection," has the effect to postpone the vesting of title as between the United States and the selector only; but as between the selector and third parties rights are determined primarily by the conditions existing at the date of making selection, and the first in right at that time continues so until default.

RIGHT TO CONTEST FOREST LIEU SELECTION.

There is no statutory right of contest against a forest lieu selection, and no preference right of entry inures to a contestant who procures the cancellation of a selection.

ADAMS, *First Assistant Secretary*:

Motion for rehearing is filed by C. W. Clarke in the matter of his forest lieu selection under the act of June 4, 1897 (30 Stat., 36), of lands in T. 15 N., R. 6 W., Olympia, Washington, land district, which was severally protested as to different portions thereof by Alma De Long, Arthur Baldwin, George W. Hamilton, Forrest Thurston Martin, George Wheaton, Carl A. Welander, Ulysses Loop and Moses Kaufman, and was held for cancellation, as to all of the tracts involved, by the Commissioner of the General Land Office, affirmed by the Department August 24, 1911, upon the finding of fact that said lands were adversely occupied at the date of said selection July 24, 1899.

These lands were unsurveyed lands when this selection was filed and were described therein by the legal subdivisions of specified sections which it was supposed they would be when surveyed. On November 30, 1901, the Commissioner of the General Land Office approved said selection.

The approved and accepted township plat of survey was filed in the local land office July 2, 1903, and in response to call upon Clarke to conform his selection thereto, he filed August 3, 1903, a statement reciting the filing of his selection, the description therein of said lands, and the filing of said plat, and that—

The said survey and plat confirms the description of the selected land as given in the application and there will be therefore no change in the description. The undersigned therefore requests that proper notation of the above be made showing that the selector has complied with the requirements of the circular of December 18, 1899 (29 L. D., 391), and that the selection be approved and patented by the description originally given.

This statement was received at the General Land Office August 10, 1903. The selection was then under suspension for cause, by order of November 21, 1902, and numerous conflicting applications by alleged settlers were held to await disposition of the selection under said order. It has been ascertained that said suspension has not been generally removed, but only in particular cases as clear lists were filed.

These protests charge only that the lands involved were occupied July 24, 1899, the date of said selection, and on hearing, pursuant to departmental decision of September 8, 1910, the local officers, the Commissioner, and the Department in the said decision of August 24, 1911, have concurred in finding that said lands were in fact occupied on the date alleged and in holding that such occupancy invalidated said selection.

Upon the question of occupancy, its character and effect as to these lands on July 24, 1899, the Department adheres to its previous holding in this case that adverse occupancy at the date of selection defeats the selection, and inquiry will not be made whether such occupancy was the initiation of a claim in the occupant under the settlement laws.

It is urged, however, that as "admittedly all of the alleged occupants had abandoned" the lands prior to September 7, 1901, when the selector completed his alleged fulfillment of all requirements made as to his selection, it should be held intact notwithstanding the lands may have been occupied at date of the selection.

The validity of the selection depends upon the conditions existing at its date. Under the specific provisions of said act of June 4, 1897, only "vacant lands open to settlement" are subject to such selection. These lands being occupied at the date of the selection, such selection was invalid, and subsequent abandonment of the lands

by the then occupant thereof did not operate to validate it. See *Frank et al. v. Northern Pacific Railway Company* (37 L. D., 193, 502); *St. Paul, Minneapolis and Manitoba Railway Company v. Donohue* (210 U. S., 21, 40).

Moreover, the approval of the selection by the Commissioner of the General Land Office upon pretended proofs of the nonoccupancy of unsurveyed lands was without basis of jurisdictional facts and conferred upon the selector no equitable title. In the case of *F. A. Hyde et al.* (40 L. D., 284), the Department stated:

Until . . . the date of the approval of the township plat of survey, no proof could have been offered by or on behalf of the selector which the Commissioner of the General Land Office was authorized to receive or upon which he was justified in making adjudication, and in final analysis no such adjudication has been made.

No such right, therefore, vested in Clarke by reason of his proffered proof or its approval as to preclude cancellation of the selection.

It appears, however, that at date of the approval of the survey (i. e. the acceptance thereof by the Commissioner of the General Land Office) said selection was a subsisting selection, based upon executed conveyances to the United States of the base lands, and filed and prosecuted in compliance with the regulations then in force (28 L. D., 521; 29 L. D., 391), and the selector, on filing of the survey plat, adjusted or attempted to adjust his selection thereto in further compliance with the regulations in force at that time (31 L. D., 372), and submitted his selection for final approval.

Such submission was, in effect, a reselection of these lands, and in this connection the citation in this motion of the decision of the Supreme Court of the United States in the case of *Durand v. Martin* (120 U. S., 366, 371) may well apply, that:

It is a matter of no moment that the selection was bad at the time it was made if at the time of its presentation for title it was good and there were no intervening rights to be injured by reason of its acceptance and ratification by the United States.

As between Clarke and the United States, he having conveyed to the United States the base lands, performed all requirements of proof up to the filing of said statement, and acted, presumptively, in good faith in making and prosecuting his selection, he is entitled to have his selection perfected as of the date of filing of his said statement on August 3, 1903, when his selection first became legally of record and properly subject to perfection and approval after the filing of the survey plat.

The fact his selection has been held to have been originally invalid because of occupancy of the selected lands at that date, controverting the nonoccupancy affidavit then filed, does not necessarily indicate that he made his selection in bad faith. The law had not then been construed as referring to mere occupancy of the lands, without regard

to the character of the occupancy, as barring a selection; and his nonoccupancy affidavit made under the view, which was not unwarranted though erroneous, that only occupancy by one having a valid claim or right constitutes such bar can not be held under such circumstances as any evidence of bad faith. See *Bergman v. Clarke* (40 L. D., 3).

Notice is taken of the provisions of paragraph 18 of the regulations of July 7, 1902 (31 L. D., 372), requiring that—

All papers and proofs necessary to complete a selection must be filed at one and the same time, and until they are all presented no right will vest under the selection.

While this regulation may properly be applied to this reselection, as in the case of *F. A. Hyde et al.*, *supra*, it did not of its own force operate thereon so as to place *Clarke ipso facto* in default. He had, as stated, acted in apparent good faith and complied with all requirements made upon him under existing regulations up to that date, August 3, 1903, and his selection was then intact on the face of the record. He could not be held to be in default under said regulations of July 7, 1902, until required to conform thereto; and the effect of said paragraph 18 is to postpone the vesting of title as between the United States and the selector, only, and not as between the selector and third parties. As to the latter, their rights are determined primarily by the conditions existing at the date of making the selection, as uniformly held by the Department, and the first in right at that time continues so until default at least.

As no statutory right of contest, and resultant preference right, exists as to a selection under said act of June 4, 1897, *supra* (*Bergman et al. v. Clarke*, 40 L. D., 231), these protests constitute no bar to or reason against entertaining said statement as a reselection.

Said statement filed August 3, 1903, should, therefore, and will be considered and adjudicated as a reselection and its validity as to occupancy of the selected lands determined as of that date. Such proof should be called for in completion thereof as the regulations may require, especially as to occupancy on August 3, 1903, and the several contests, protests and conflicting applications involved be disposed of accordingly, as the allegations therein may warrant, under the views herein expressed.

This motion is, therefore, sustained; the decision of August 24, 1911, is modified in accordance with the foregoing; and the case is remanded for action as herein directed.

DeLONG v. CLARKE.

Motion for rehearing of departmental decision of August 3, 1912, 41 L. D., 278, denied by First Assistant Secretary Adams, September 13, 1912.

WILLIAM M. TAGGART.

Decided August 7, 1912.

ENLARGED HOMESTEAD—ADDITIONAL—LIMIT OF LENGTH.

An additional entry under section 3 of the enlarged homestead act of February 19, 1909, can not be allowed where the additional lands applied for, together with the lands embraced in the original entry, exceed one and one half miles in length.

ADAMS, *First Assistant Secretary:*

June 23, 1910, William M. Taggart made homestead entry for lots 1, 2, 3 and 4, Sec. 3, T. 4 N., R. 35 E., Fort Sumner, New Mexico, land district.

April 4, 1911, he filed application to enter lot 4, Sec. 1, lots 1, 2, 3 and 4, Sec. 2, and lots 1 and 2, Sec. 4, said township, as additional to the entry above described, under section 3 of the enlarged homestead act of February 19, 1909 (35 Stat., 639). Said latter application was rejected by the local officers for the assigned reasons that the lands described were not in a reasonably compact form, and that they exceed $1\frac{1}{2}$ miles in length.

The Commissioner held that the application exceeded the limit of $1\frac{1}{2}$ miles in length expressed in the said act to the extent of $1\frac{1}{4}$ miles. Taggart has appealed to the Department from the action taken.

The original entry above described contains 90.72 acres, extending in a line east and west a distance of one mile. The additional entry embraces 158.49 acres, and lies upon either side of the original entry. Upon the west of the original entry, the additional entry extends one-half mile. That portion upon the east extends $1\frac{1}{4}$ miles, making in the aggregate $1\frac{3}{4}$ miles as the length of the additional entry, and the combined entries $2\frac{3}{4}$ miles.

The first section of the enlarged homestead act requires that lands entered thereunder shall be "located in a reasonably compact body, and not over $1\frac{1}{2}$ miles in extreme length." It should first be noted that this township was designated as enterable under the enlarged homestead act April 27, 1909, more than one year prior to the making of Taggart's original homestead. It is clear that at the time of making said original entry he could not have entered the entire body embraced in his original entry and covered by his pending application. It results, therefore, to allow the same in the manner asserted would, by indirection, accomplish what the statute directly prohibited. In this connection it must be noted that the third section of the enlarged homestead act in providing for additional homesteads makes the same "subject to the provisions of this act." The evident purpose was to extend to those having made entry of 160 acres or less of lands designated under the enlarged act, the right to enlarge through an additional entry the homestead claim previously asserted

but upon the same conditions exacted of an original claimant under the enlarged homestead act.

Upon a careful review of the matter, therefore, it must be held that no error was committed in the decision of the Commissioner appealed from in refusing the additional application in question and the decision is therefore affirmed.

MARSHALL F. HOPPER.

Decided August 10, 1912.

DESERT-LAND APPLICATION—ENLARGED HOMESTEAD ENTRY—ACT OF AUGUST 30, 1890.

The provision in the act of August 30, 1890, limiting the amount of land that may be acquired by one person under the agricultural public-land laws to 320 acres, will prevent one who has of record an entry made under the enlarged homestead act for 320 acres, or its equivalent, from making entry under the desert-land law.

ADAMS, *First Assistant Secretary:*

Marshall F. Hopper has appealed from the decision of the Commissioner of the General Land Office affirming the rejection, by the local officers, of his desert land application, filed on January 10, 1911, for lot 2, Sec. 4, T. 36 N., R. 4 E., and S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 33, T. 37 N., R. 4 E., 157.69 acres, M. M., Havre, Montana, land district; the reason assigned for such rejection being that Hopper had a subsisting homestead entry, made under the act of February 19, 1909 (35 Stat., 639), for 309.02 acres, and was not, therefore, qualified to make a desert land entry.

In support of the appeal, the applicant urges the injustice of the action below, inasmuch as one who has a desert land entry for 160 acres may make an enlarged homestead entry for 320 acres. Whatever force this fact may possess is for the consideration of the law-making power in determining whether qualifications to make entry under existing statutes should be enlarged or abridged.

The act of February 19, 1909, *supra*, amended only the *homestead* law as to the area that might be embraced in an entry, and there is no known rule of statutory construction to warrant the Department in holding that said act, by implication, modified the provisions of the act of August 30, 1890 (26 Stat., 391), except to the extent necessary to carry into effect its provisions for an enlarged homestead. The *qualifications* of an applicant to make entry under any of the public land laws are not affected by said act of February 19, 1909, since, as has been held by the Department (Instructions of April 2, 1912, 40 L. D., 526), even the right to an enlarged homestead is dependent upon the right of homestead entry conferred by section 2289 of the

Revised Statutes. Manifestly, therefore, the act of August 30, 1890, in its application to qualifications of desert land entrymen, has not been changed by the passage of the act of February 19, 1909; and any argument based upon the relative values of an entry made under the latter act as compared with the ordinary homestead is without force, for the reason that the act of August 30, 1890, is a limitation upon the area, not the value, of the land. Had the applicant a subsisting desert land entry for 320 acres he would not be qualified to make an entry under the enlarged homestead act or any of the agricultural land laws. The converse of this proposition is, necessarily, true; that is, having an enlarged homestead entry of record for 320 acres, or its equivalent, he can not make a desert land entry.

The decision of the Commissioner of the General Land Office is, accordingly, affirmed.

MARTIN v. PATRICK.

Decided August 10, 1912.

FOREST LIEU SELECTION—CONTESTANT—PREFERENCE RIGHT.

The right of lieu selection accorded by the act of June 4, 1897, is not transferable; and the presentation of such a selection by a successful contestant, not in his own right but as attorney in fact for another entitled to make a lieu selection under that act, is not a proper exercise of the preference right of entry, and no right inures to contestant by virtue of such attempted selection.

CONTRARY DECISION OVERRULED.

Linhart v. Santa Fe Pacific R. R. Co. et al., 36 L. D., 41, overruled.

ADAMS, *First Assistant Secretary*:

Joseph P. Martin has appealed from the decision of the Commissioner of the General Land Office, dated October 17, 1911, holding intact Charles G. Patrick's soldiers' additional homestead entry, made on July 10, 1907, for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 25, T. 5 S., R. 40 E., M. D. M., Carson City, Nevada, land district.

The homestead entry of one Cartee for the above described tract was canceled as the result of a contest prosecuted by the appellant, and Patrick was allowed by the local officers, during the preference right period, to make said entry. In the attempted exercise of his preference right, Martin, as attorney in fact for the Santa Fe Pacific Railroad Company, offered application to make forest lieu selection for the land, under the act of June 4, 1897 (30 Stat., 11, 36), which was rejected by the register and receiver. Upon appeal, the Commissioner affirmed their action, holding that since neither the preference right of entry conferred by section 2 of the act of May 14, 1880 (21 Stat., 140), nor the right to select lieu land under the act of June 4, 1897, *supra*, is transferable, Martin acquired no right by

virtue of filing the said application to make lieu selection, citing *Schlabsz v. Schulz* (38 L. D., 291).

The principle involved in this case is identical with that announced in that of *Beery v. Northern Pacific Railway Company et al.* (41 L. D., 121), decided by the Department on May 28, 1912. For the reasons stated therein, the decision of the Commissioner is affirmed, Martin's application dismissed, and Patrick's entry will remain intact.

The case of *Linhart v. Santa Fe Pacific Railroad Company* (36 L. D., 41), urged by the appellant as authority herein, and all others indicating a similar view, are hereby overruled.

MARTIN v. PATRICK.

Petition for exercise of the supervisory authority of the Secretary to review departmental decision of August 10, 1912, 41 L. D., 284, denied by First Assistant Secretary Adams, October 10, 1912.

CHARLES S. FISK.

Decided August 15, 1912.

KINKAID ACT—ADDITIONAL ENTRY—SECTION 7, ACT OF MAY 29, 1908.

Section 7 of the act of May 29, 1908, amending the Kinkaid Act and authorizing one who has an entry thereunder of less than 640 acres to enter sufficient contiguous land to aggregate 640 acres, has no application to one whose entry under the Kinkaid Act was limited to less than 640 acres because of the fact that he had theretofore made entry under the general provisions of the homestead law, said section contemplating that the aggregate of all entries by one person—under the general homestead law, the Kinkaid Act, and the amendatory act—shall not exceed 640 acres.

ADAMS, *First Assistant Secretary*:

Charles S. Fisk appealed from decision of the Commissioner of the General Land Office of November 18, 1911, denying his application to amend his homestead entry to include W. $\frac{1}{2}$ of W. $\frac{1}{2}$, Sec. 23, T. 28 N., R. 24 W., 6th P. M., Valentine, Nebraska.

March 4, 1907, Fisk made entry for N. $\frac{1}{2}$ and N. $\frac{1}{2}$ of S. $\frac{1}{2}$, Sec. 23, 480 acres. May 23, 1911, he applied under act of May 29, 1908 (35 Stat., 465), to include W. $\frac{1}{2}$ of W. $\frac{1}{2}$, Sec. 23, adjoining his original entry. The Commissioner found from his records that August 13, 1903, Fisk made homestead entry for NW. $\frac{1}{4}$, Sec. 34, T. 105 N., R. 77 W., Pierre, South Dakota, commuted to cash entry November 8, 1905. The Commissioner held that, as Fisk had obtained title to 160 acres prior to the present existing entry, his right was exhausted, and the amendment could not be allowed.

Section 7 of act of May 29, 1908, amends section 2, act of April 28, 1904 (33 Stat., 547), Kinkaid Act, to permit those having Kinkaid entries to enter contiguous land, not exceeding 640 acres in the aggregate. Section one, as so amended, must, however, be construed in connection with section 3 of the Kinkaid Act, of which it is a part, and provides:

That a former homestead entry shall not be a bar to the entry under the provisions of this act of a tract which, together with the former entry, shall not exceed six hundred and forty acres.

This limitation was not taken away by amendment of the first section, and that section as amended is still limited to the area of six hundred and forty acres by all entries by one person.

The decision is affirmed.

JOSEPH F. GLADIEUX.

Decided August 16, 1912.

RECLAMATION WITHDRAWAL—CONTEST—PREFERENCE RIGHT.

A successful contestant of an entry within a reclamation withdrawal is not barred of his preference right by section 5 of the act of June 25, 1910; but said section has the effect to postpone the exercise of such right until the project is so far completed that water can be applied to the land and the Secretary of the Interior has made public announcement of that fact.

CONTESTANT—PREFERENCE RIGHT—RECLAMATION PROJECT.

A successful contestant in exercising his preference right of entry upon lands within a reclamation project is limited to one farm unit, although such unit may embrace less than the area covered by the entry he contested.

ADAMS, *First Assistant Secretary*:

Joseph F. Gladieux appealed from decision of the Commissioner of the General Land Office of November 23, 1911, rejecting his homestead application for NW. $\frac{1}{4}$, Sec. 14, T. 2 N., R. 4 E., G. & S. R. M., Phoenix, Arizona.

The land was withdrawn for reclamation purposes, under act of June 17, 1902 (32 Stat., 388), July 2 and August 26, 1902, which withdrawal is still in force. The land was previously entered by John J. Thoma, against whom Gladieux brought contest, which prevailed, and June 10, 1911, he was notified, as successful contestant, of cancellation of the entry and his preference right under act of May 14, 1880 (21 Stat., 140). He applied for entry, which was rejected by the local office, and that action the Commissioner affirmed under section 5, act of June 25, 1910 (36 Stat., 835).

The appeal alleges error that at time of passage of act of June 25, 1910, the land was not vacant public land and not affected by passage of the act; that the act does not supersede or set aside that of May 14, 1880, *supra*, as amended July 26, 1892 (27 Stat., 270).

The act last referred to provides:

In all cases where any person has contested, paid the land office fees, and procured the cancellation of any preemption, homestead or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands.

The act of June 25, 1910, *supra*, however, provided:

That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and make public announcement of the same: *Provided*, That where entries made prior to June twenty-fifth, nineteen hundred and ten, have been or may be relinquished in whole or in part, the lands so relinquished shall be subject to settlement and entry under the homestead law as amended by an act entitled "An act appropriating the receipts from the sale and disposal of the public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two (Thirty-second Statutes at Large, page three hundred and eighty-eight).

It does not appear proper or necessary to hold that the later act was incompatible with that of May 14, 1880 (21 Stat., 140), which grants a successful contestant a preference right to make entry of the land included in a former entry contested. The preference right is a reward offered to one who has expended his money and time in obtaining cancellation of an unlawful holding of public land. The general rule is that a later act will not repeal a former, unless both acts can not stand together. A mere postponement of exercise of the preference right is all that the later act requires. The later act may be given full effect without destroying the right granted by the earlier one. As a successful contestant has rendered a public service, his reward should not be denied by the executive, though it may be postponed of its fruition by the later act. The effect, then, is that Gladieux has acquired a preference right of entry, the exercise of which is suspended until the project is so far completed that water can be applied to the land and the Secretary has made public announcement of the fact. Otherwise, if immediate entry be allowed, the purpose of the act of June 25, 1910, would be thwarted.

It is also to be remembered that in exercise of his preference right Gladieux can enter no more than one farm unit, as all entries of lands in reclamation projects are restricted to one farm unit, though that may be less than the area of the entry he contested.

The decision is affirmed, in so far as it rejected the application to make entry at the time it was presented, but his preference right to make entry will be recognized to the extent of one farm unit of the contested land, when entry is again permissible under act of June 25, 1910 (36 Stat., 835), and the decision is reversed so far as it denies any preference right.

JEFFERSON LIME COMPANY.

Decided August 19, 1912.

REPAYMENT—PURCHASE MONEY—MINING CLAIM—APPLICATION FOR PATENT.

Where an applicant for patent for a mining claim, after due notice that charges have been filed by an officer of the government affecting the validity of the claim, fails to make any denial of the charges or to apply for a hearing, and the application is thereupon rejected, he is not entitled, in the absence of a showing that the default and judgment were taken as the result of mistake, surprise, or excusable neglect on his part, to repayment of the purchase moneys paid in connection with the application for patent.

ADAMS, First Assistant Secretary:

This is an application by the Jefferson Lime Company, by F. T. McBride, its president, for the return of the purchase money paid in connection with its mineral application for patent 02424, filed November 20, 1907, at Helena, Montana, for the Pipestone placer claim.

After due proceedings, the purchase money was paid and final receipt issued therefor, June 17, 1908, mineral entry, however, not being allowed, due to a protest having been filed by the Forest Service. Upon February 18, 1910, the Commissioner directed that notice of charges, based upon a report of a forest officer, be issued, except as to 20 acres of the claim which covered a limestone exposure. The charges were as follows:

1. That no discovery of mineral has been found.
2. That \$500 has not been expended on the claim.

Notice of these charges was issued by the register and receiver February 24, 1910, and no denial thereof or application for hearing having been filed, they, according to the procedure governing such cases, rendered their decision, finding that the charges had been sustained, August 28, 1910.

The application for repayment was filed January 23, 1911, and it is corroborated by an affidavit by the manager of the company reiterating the company's belief that the land is mineral in character but stating that, at the time the proceedings against the application were instituted, the company had discontinued its lime mining business and, in view of that fact, did not care to undertake any litigation with the Government which would necessarily cause it to incur considerable expense. The Commissioner denied the application for repayment June 30, 1911, from which an appeal to the Department has been prosecuted.

The charges made against the application were, if true, sufficient to warrant the denial of the application, and the failure on the part of the claimant to in any manner deny the charges justified the finding and judgment of the register and receiver that the charges

were true. On the present application, there is no attempt made to show that the default and judgment were taken as the result of mistake, surprise, or excusable neglect on the part of the applicant, and, in addition thereto, the record here fails to disclose any sufficient denial or challenge of the charges, or of the finding and judgment of the local officers.

The decision of the Commissioner is, therefore, correct, and is affirmed.

DAHL v. BAILEY.

Decided August 22, 1912.

LEAVE OF ABSENCE—CONTEST FOR ABANDONMENT—ACT OF JANUARY 28, 1910.

The act of January 28, 1910, granting a leave of absence to homestead settlers in certain States for a period of three months from the date of the act, does not have the effect to protect such entries from a charge of abandonment for six months after the termination of the period of absence granted; but where absence next prior to such period of leave, and absence next following the same, together amount to more than six months, contest on the charge of abandonment will properly lie.

CONTRARY DECISION OVERRULED.

Esping v. Johnson, 37 L. D., 709, overruled.

ADAMS, *First Assistant Secretary*:

Appeal is filed by Andrew Dahl from decision of October 19, 1911, of the Commissioner of the General Land Office affirming the action of the local officers and dismissing said Dahl's contest against original homestead entry made by William S. Bailey March 13, 1907, for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 5, T. 54 N., R. 61 W., 6th P. M., Sundance, Wyoming, land district.

Said Bailey also made additional homestead entry August 23, 1909, for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, of said section, and the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 8, same township and range.

Said Dahl's contest affidavit filed June 9, 1910, charges that said Bailey had wholly abandoned said original entry, that he had not settled upon and cultivated the same as required by law, and had changed his residence therefrom for more than six months past.

Hearing was duly had at which both parties appeared and presented testimony, upon consideration of which the local officers and the Commissioner have concurred as stated in finding in favor of the entryman, the Commissioner holding also that in view of the provisions of the act of January 28, 1910 (36 Stat., 189), granting three months' leave of absence from the date of that act, contest would not lie herein until more than six months from April 28, 1910, when such leave expired.

The Department has carefully reviewed the record herein and finds the facts to be as set forth in the Commissioner's decision, a restatement of which herein is, therefore, unnecessary. The date of establishment of residence does not appear, but according to the contestant's own testimony Bailey resided on this land up to October, 1909, and the other testimony shows he returned to the land in February, 1910, and again about the middle of May, 1910, married May 21, 1910, and has lived on the land since June 14, 1910. Abandonment of said entry for six months, excluding the period of the leave of absence granted by said act, is not shown; it appearing from the testimony that the entryman was absent less than four months prior to the passage of said act and that he returned to the land within three weeks after April 28, 1910, when the leave granted by said act expired, making altogether less than six months' absence outside of said statutory leave.

The Commissioner's holding that contest would not lie until more than six months after April 28, 1910, is not approved. The period of absence, for which leave is granted by said act, is merely eliminated from consideration in cases of entries affected by said act, and if absence next prior to such period of leave and absence next following same together amount to more than six months, contest on the charge of abandonment may properly lie, although within six months after April 28, 1910. The opposite conclusion was reached, with reference to a similar law granting leave of absence, in the case of *Esping v. Johnson* (37 L. D., 709), which will no longer be followed.

The decision appealed from, as herein modified, is affirmed.

GRANT TO CANON CITY AND BOULDER, COLORADO—ACT AUGUST 22, 1912.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, October 2, 1912.

The act of August 22, 1912 (Public—No. 285), authorizes the conveyance to Canon City, County of Fremont, and City of Boulder, County of Boulder, Colorado, such portions of certain land therein described as said cities may desire. The act was made subject to all the conditions and provisions contained in section 2 of the act of June 7, 1910 (36 Stat., 459).

Section 2 of said act of June 7, 1910, provides for the conveyance to the cities and towns in said act mentioned the land therein de-

scribed, "or such portions thereof as they may select, respectively," upon payment of \$1.25 per acre—

to have and to hold for public park purposes, subject to the existing laws and regulations concerning public parks, and that the grant hereby made shall not include any lands which at the date of the issuance of patent shall be covered by a valid, existing, bona fide right or claim initiated under the laws of the United States: *Provided*, That there shall be reserved to the United States all oil, coal, and other mineral deposits that may be found in the land so granted, and all necessary use of the land for extracting the same: *And provided further*, That said cities and towns shall not have the right to sell or convey the lands herein granted, or any parts thereof, or to devote the same to any other purpose than as hereinbefore described; and that if the said lands shall not be used as public parks, the same or such parts thereof not so used, shall revert to the United States.

The land shall be selected by the towns, respectively, by Government subdivisions, and the corporate authorities applying to enter the tracts selected must file therewith a notice of intention to make proof, and thereupon a notice for publication must be issued, published and posted at the expense of the municipality, as in other cases, and in manner and form and for the time provided in the act of March 3, 1879 (20 Stat., 472), and the regulations thereunder.

The proof will be made before the register and receiver of the proper land office, or any officer duly authorized by law, and must show:

First. The due publication of the register's notice of making proof.

Second. The official character of the officer making the application and his express authority to do so conferred by action of the board of trustees or common council of the municipality, which action should also describe the tract selected.

Third. A copy of the record, certified by the officer having charge thereof, showing the due incorporation of the city or town, or if incorporated by legislative enactment, a citation to the act.

Fourth. The testimony of the applicant and two of the published witnesses to the effect that the land applied for is vacant and unappropriated by any other party.

Should the local officers find the proof sufficient in all respects, they will issue a cash entry to the municipality in its corporate name for the land selected, upon payment of \$1.25 per acre therefor.

The granting clause in the certificate should be in substance as follows:

Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land Office, the said town (or city) of ———, Colorado, shall be entitled to a patent for the tract of land above described, but reserving therefrom to the United States all oil, coal, and other mineral deposits that may be found in the land, and all necessary use of the land for extracting the same; to have and to hold the land for public park purposes, subject to the existing laws and regulations concerning public parks, and further subject to all the restrictions, conditions, reservations, purposes, and rever-

sions in said act expressed, and reserving a right of way thereon for ditches or canals constructed by authority of the United States.

S. V. PROUDFIT,
Acting Commissioner.

Approved:

SAMUEL ADAMS,
Acting Secretary.

ADDITIONAL HOMESTEAD ENTRIES—SECTION 2, ACT OF APRIL 28, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 2, 1912.

REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: Referring to circulars of May 20, 1904 (32 L. D., 639), July 27, 1907 (36 L. D., 46), and September 11, 1908 (37 L. D., 160), concerning additional entries under Sec. 2 of the act of April 28, 1904 (33 Stat., 527), the following additional rule is hereby announced:

An applicant to make entry under this section, in each case wherein final (not commutation) proof upon the original entry has theretofore been made, will not be required to make further proof of compliance with law as to residence and cultivation as to the additional entry, but the applicant will be required to begin, within twenty days from the filing of his application, publication of notice thereof, at his own expense, in a newspaper to be designated by the register as of general circulation in the vicinity of the land, and to be the nearest thereto. Such publication must cover a period of thirty days during which time similar notice of the application must be posted in the local land office. The notice must describe the land included in, and give the date of, the application, and state that the purpose thereof is to allow all persons claiming the land adversely, or desiring to show it to be mineral in character, an opportunity to file objection to the application with the local land officers for the land district in which the land is situate, and to establish their interest therein, or the mineral character thereof.

In cases where the additional entry is made prior to the publication of notice of intention to submit proof upon the original entry, and proof upon both entries is made at the same time, both the original and additional entries must be described in the published notice of intention to submit proof and in the notice posted in the local land office.

In cases where proof is submitted upon the original and additional entries separately, the published and posted notices usual in homestead cases will be required.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
Acting Secretary.

RECLAMATION WITHDRAWALS—SETTLEMENT—IMPROVEMENTS.**ORDER.**

DEPARTMENT OF THE INTERIOR,
Washington, October 3, 1912.

A number of cases having occurred where in operations under the reclamation act the United States has been subjected to expense in compensating settlers who have located upon and improved lands withdrawn under the reclamation act, notwithstanding the prior withdrawal, it is hereby ordered that—

(1) Whenever knowledge is acquired by any engineer or employee of the Reclamation Service that any person has settled upon lands withdrawn under the first form, or upon lands withdrawn under the second form, before they have been declared subject to entry, and after such withdrawal, written notice be served upon the settler to the effect that the land is not subject to settlement, and that no preference right can be acquired thereby in the event of the future opening of the land to entry.

(2) Where a settler is preparing to make improvements or expenditures upon withdrawn land needed or likely to be needed for reclamation work, or where settlement or occupation interferes or is likely to interfere with the operations of the Service, the notice served shall contain information to the effect that the occupation is illegal and that unless the entryman promptly vacates the land, or shows cause as to why he should not do so, proper steps will be taken in the courts to secure his removal. Notices provided for in paragraphs 1 and 2 should be limited to statements in substantially the language indicated.

(3) If after service of notice to vacate, the entryman does not, within a reasonable time comply with the notice, the engineer shall at once report all facts to the Director of the Reclamation Service, through the supervising engineer in charge of the district embracing the project, the report to contain sufficient information to form basis of appropriate legal action.

(4) Copies of notices served by engineers or employees in pursuance of this order will be at once furnished to the local land office and to the Director of the Reclamation Service, through the office of the supervising engineer.

SAMUEL ADAMS,
Acting Secretary.

REGIONE v. ROSSELER.

Petition for exercise of supervisory authority of the Secretary in this case, in which departmental decision on appeal (40 L. D., 93) was vacated on rehearing February 5, 1912 (40 L. D., 420), denied by First Assistant Secretary Adams, October 8, 1912.

PLATS OF SURVEY OF MINING CLAIMS IN ALASKA.**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, October 8, 1912.

UNITED STATES SURVEYOR-GENERAL,
Juneau, Alaska.

SIR: Office circular No. 38, approved by the Acting Secretary July 29, 1911 [40 L. D., 216], entitled "Instructions for preparation and disposition of plats of survey of mining claims," in so far as the same applies to the District of Alaska, is hereby amended by changing the fourth paragraph thereof to read as follows:

The Commissioner will have three photolithographic copies made upon drawing paper, two copies of which, with the original plat, will be forwarded to the surveyor-general, the duplicate and triplicate to be signed by him, and the three plats to be filed and disposed of as follows: One plat and the original field notes to be retained in the office of the surveyor-general; one plat and a copy of the field notes to be given the claimant, for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor-general to the register of the proper land district, to be retained in his files for future reference. The Commissioner will mail one photolithographic copy of the plat, made upon drawing paper, direct to the applicant for survey, or to his agent or attorney, when the application is made by agent or attorney, at his record address, to be used for posting on the land.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

GEORGE W. DALLY ET AL.*Decided January 3, 1912.***PRACTICE—HEARING—DISQUALIFICATION OF REGISTER AND RECEIVER.**

Under the general provisions of law charging the Commissioner of the General Land Office, under the supervision and direction of the Secretary of the Interior, with the public business relating to the public lands, he has full power, in case the register and receiver are deemed by him disqualified to preside at a hearing in a proceeding affecting public lands, to designate two proper officers to preside at such hearing in their stead.

PRACTICE—DECISION OF REGISTER AND RECEIVER—JURISDICTION OF COMMISSIONER.

A decision by the register and receiver, or other proper officers acting in their stead, is more in the nature of a recommendation to the Commissioner of the General Land Office than a judgment, and the Commissioner has jurisdiction to render his judgment, subject to review by the Secretary of the Interior, irrespective of or in the absence of such recommendation.

PROCEEDING BY GOVERNMENT—CHARGE—COAL LAND ENTRY.

The charge by a field officer of the land department against a coal land entry that the claimant did not make the entry for his own use and benefit, but for the use and benefit of some coal company, designating the company by name, is sufficient to advise the claimant of the charge he is called upon to meet and, if proved, to warrant cancellation of the entry, notwithstanding the fact that the company so designated may not have been organized until subsequent to the date of the entry, where it appears that the entryman acted as a mere automaton, without interest in the entry, and was controlled by the agents and representatives of one who was the directing factor in the formation of the company designated in the charge as beneficiary of the entry.

ADAMS, *First Assistant Secretary:*

This is an appeal from the decision of the Commissioner of the General Land Office of February 13, 1911, holding for cancellation coal cash entry No. 18, made June 22, 1906, at Lander, Wyoming, by George W. Dally and Henry Cottle, for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 13, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and lots 1, 2, 3, and 4, Sec. 12, T. 44 N., R. 95 W., containing 320.64 acres, upon charges preferred by a field officer. Similar proceedings have been had relative to coal cash entries Nos. 19 to 49, inclusive, each made on the same day by two individuals in association, all of which have been held for cancellation by the Commissioner in the decision now under consideration. The matter has been orally argued before the Department and counsel for appellants have filed exhaustive briefs relative to the questions presented by the voluminous record.

The contentions of the appellants may be briefly summarized as follows:

(1) The Commissioner and the Department are without jurisdiction to render any judgment in the matter, for the reason that the substitution of two special agents of the General Land Office

to sit at the hearing and render the decision of the local office in place of the regular officers was beyond the power of the Department, and that therefore there is no valid judgment of the local officers to be reviewed.

(2) That the statement of charges, as served upon the parties in interest, did not state facts sufficient to warrant the cancellation of the entries.

(3) That the Commissioner has based his judgment of cancellation upon allegations not contained in such statement.

(4) That the decision of the Commissioner upon the merits is erroneous, it being contended that the charges, if deemed sufficient, have not been proven.

The contentions will be considered in the order named.

Relative to the first, it appears that upon January 14, 1910, the Chief of Field Division reported to the Chief of Field Service that the register and receiver at Lander would be called upon to testify as to certain facts in the hearings as to the above entries, and submitted the question whether or not they were disqualified from hearing the evidence and rendering an opinion, although himself expressing the view that they were not disqualified. The letter was accompanied by the affidavits of the two officers, containing a statement of facts which their testimony would embrace. The record discloses that they did testify at the hearing and some of their testimony relates to facts which were not mere matters of record in their office. Prior to the hearing the greater part of the testimony had been taken by depositions in the city of New York, and the commissions to the officers for the taking of such depositions and all other orders relating to the proceedings had been issued by the regular officers. The Commissioner, however, was of the opinion that the register and receiver were disqualified, and February 1 and 2, 1910, designated two special agents to sit in their place, which designations were approved by the Department.

Proceedings upon the adverse report of a special agent of the General Land Office at the time of the hearings here involved were regulated by the instructions of September 30, 1907 (36 L. D., 112). These are solely a matter of departmental regulation, there being no statutory provision therefor, except what might be inferred from the annual appropriations by Congress to defray the expenses of hearings held thereunder. Paragraph 12 of these regulations required that after a hearing has been had "the local officers will render their decision upon the record, giving due notice thereof in the usual manner."

In the case of *Caldwell v. Johnson* (37 L. D., 35) the Department had held that where the register or receiver is sworn as a witness and testifies as to a disputed fact at the hearing in a contest case, he

should not act in his official capacity in the decision. The situation which confronted the Commissioner was that under the above decision of the Department the register and receiver were both apparently disqualified, while paragraph 12 of the instructions of September 30, 1907, required a "decision of the local officers."

The act of January 11, 1894 (28 Stat., 26), provides:

SEC. 1. That no register or receiver shall receive evidence in, hear, or determine any cause pending in any district land office in which cause he is interested directly or indirectly, or has been of counsel, or where he is related to any of the parties in interest by consanguinity or affinity within the fourth degree, computing by the rules adopted by the common law.

SEC. 2. That it shall be the duty of every register or receiver so disqualified to report the fact of his disqualification to the Commissioner of the General Land Office as soon as he shall ascertain it, and before hearing of such cause, who thereupon, with the approval of the Secretary of the Interior, shall designate some other register, receiver, or special agent of the land department to act in the place of the disqualified officer, and the same authority is conferred on the officer so designated which such register or receiver would otherwise have possessed to act in said case.

The appellants contend that the register and receiver here were not disqualified under the provisions of section 1 and, further, that there having been no report by them to the Commissioner, as required by section 2, there was no authority for the designation of other officers to act in their place, citing also *Emblen v. Weed* (16 L. D., 28). In that case the receiver had a pecuniary interest in the preemption cash entry which was the subject of a contest hearing before him. The Department stated at page 33:

That a judge having a pecuniary interest in a case on trial, is thereby incapacitated for sitting in the cause, is well established both by statute and decisions. With local land officers, however, the case is somewhat different. The law and the rules and regulations of the Department require each of them to take part in the consideration of all cases in which the land in dispute is situated in the district for which they are officers. There are no provisions for a change of venue or for the calling in of any other officer to sit in a particular case. Both must take part in considering the evidence, and upon the termination of a contest, Rule 51 of the Rules of Practice requires them to render a report and opinion in the case.

This view, however, was modified upon review *Emblen v. Weed* (17 L. D., 220). The first paragraph of its syllabus reads:

A local officer, who has a property interest in the subject-matter involved in a contest, is not qualified to try and determine the case.

The Department further stated at page 224:

It is also shown by the record that the receiver of the office at Akron has some property rights that would be disturbed by the cancellation of this entry. While there is no rule or regulation of this Department providing for a change of venue in such case or the substitution of some other officer not interested in the result of the trial, every consideration of propriety would dictate that one having an interest in the controversy should not be permitted to control

or participate in the judgment. Such an exercise of jurisdiction is abhorrent to English and American jurisprudence. In fact such an interest, *per se*, disqualifies the court from exercising jurisdiction.

. . . The fact that he has a property interest in the controversy deprives him of jurisdiction to try and determine the case under all the rules of the common law, and it is more than doubtful whether a statute extending such jurisdiction to a court or other tribunal would stand the test of judicial investigation.

The report of the case shows that a new hearing was ordered, with a statement that an agent to represent the interests of the Government should be present, but it fails to clearly disclose what provisions, if any, were made relative to filling the place of the officers held to be disqualified. Both of these decisions it should be noted were rendered prior to the passage of the act of January 11, 1894.

Assuming for the purposes of this case that the disqualification here present is not one of those mentioned in section 1 of the act, that the affidavits by the register and receiver transmitted by the Chief of Field Division could not be construed to be the report required by section 2, and further that such report is a condition precedent to the designation of some other register, receiver, or special agent by the Commissioner, the Department is nevertheless of the opinion that the designation of the other officers in this case was proper and within the legal powers of the land department.

Under section 441 of the Revised Statutes the Secretary of the Interior is charged with the supervision of public business relating to the public lands, and under section 453 the Commissioner—

shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

Section 2478 provides:

The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

Under the above provisions it can not be doubted that the Department had full power to prescribe the regulations of September 30, 1907. See *Kern Oil Company et al. v. Clarke* (31 L. D., 288); *Lytle et al. v. The State of Arkansas* (9 How., 314, 332). The Supreme Court there said relative to a certain requirement by the Commissioner as to preemption proofs:

The law did not require the presence of the land officers when the proof was taken, but, in the exercise of his discretion, the Commissioner required the proof to be so taken. Having the power to impose this regulation, the Commissioner had the power to dispense with it for reasons which might be satisfactory to him.

So here the Department undoubtedly has power to make the regulation contained in paragraph 12 of the instructions of September 30, 1907, and might also waive the requirement of a decision by the register and receiver for satisfactory reasons. Finding that the regular officers were disqualified, and taking into consideration the necessity of having some officer of the Department present to preside at the hearing, the Commissioner, in the opinion of the Department, had full power to designate two proper officers to so act. It should further be stated, however, that the appellants do not charge that the officers designated did not conduct the hearing in a proper and impartial manner.

Further, a decision by the register and receiver or the officers designated to act in their stead is not necessary to the vesting of jurisdiction to render a judgment in the Commissioner. In *Sullivan v. Seeley* (3 L. D., 567) the Department said:

The procedure by contest to procure the cancellation of an entry closely resembles, in many respects, an ordinary trial by jury. Just as a jury find a verdict, "according to the evidence," in favor of plaintiff, so the register and receiver find the facts on which is based their recommendation for cancellation. As the court enters up or refuses to enter judgment on the verdict of the jury, so does the Commissioner act in relation to the findings of the local officers. In each case the finding is that of a tribunal "of competent, though limited, jurisdiction," in the language of counsel. But it can not be that the findings of the register and receiver, as claimed by him, any more than the verdict of a petit jury, "at the expiration of the time allowed for appeal, become final," and in effect a judgment. The findings of the register and receiver can no more effect the cancellation of an entry, *proprio vigore*, than the verdict of a petit jury can of itself authorize an execution—the one requires the vitalizing approval and order of the Commissioner and the other the formal judgment of the court, before the desired end is attainable. The final action of the Commissioner or the court may never be taken, and the findings of the local officers and the jury, alike, would be of no effect whatever.

See also *Morrison v. McKissick* (5 L. D., 245, at page 247) where it is held:

The action of the register and receiver is in no sense final as to the rights of the Government, but in all cases their decision either upon the law or facts is subject to the approval of the Commissioner, whether directing the cancellation of an entry or approving it for patent. If the decision of the register and receiver has no force or effect to direct the cancellation of an entry, or to authorize the issuance of a patent, unless approved by the Commissioner, it follows that their decision would be inoperative, whether appealed from or not.

Also *Kern Oil Company et al. v. Clarke*, *supra*, the last paragraph of its syllabus.

The decision of the register and receiver is, under the above decisions, more in the nature of a recommendation to their superior officer than a judgment, and the Commissioner has jurisdiction to render his judgment, subject to review by the Department, irrespec-

tive of or in the absence of such recommendation. The first contention of the appellants is accordingly overruled.

Relative to the second contention, it should at the outset be pointed out that the entries for convenient consideration fall into three groups: (1) Those which after entry were transferred to a corporation known as the Northwestern Coal Company, and which may be termed the Northwestern entries; (2) those which after entry were transferred to a corporation known as the Owl Creek Coal Company, and which may be termed the Owl Creek entries; (3) those which were not transferred to either of the above corporations, and which may be termed the individual entries.

The following comprise the Northwestern group: No. 32, Clark H. Abbott and Bartholomew B. Coyne; No. 34, Jesse D. McCreery and Emil H. Intemann; No. 35, Warren D. Hamilton and Thomas J. Dally; No. 37, William H. Handy and Alfred B. Carhart; No. 38, Henry J. Benhardt and Louis J. Thompson; No. 39, Charles B. Donneley and Cora M. Donneley; No. 40, John T. Coulter and John J. Gleason; No. 41, Louis I. Moore and George Kupfrian; No. 42, Henry Meyers and Daniel S. Voorhees; No. 43, John C. O'Connor and Daniel J. Dowling; No. 44, Charles M. Reynolds and William E. Preece; No. 45, Charles F. Werner and Mary Jane Werner; No. 46, John C. McKibbin and John J. Costello; No. 47, Nellie J. Heagen and Herman A. Brohmer; No. 48, George W. Driscoll and Frederick Ilsemann; No. 49, Henry Wood and Anna M. Wood. In Nos. 35 and 37 the corporation has but a half interest, as neither Thomas J. Dally nor Alfred B. Carhart have conveyed to it.

The Owl Creek group comprises the following: No. 25, Charles L. Edwards and Mary A. C. Edwards; No. 26, George W. Gates and Jennie C. Gates; No. 27, John E. Ireland and Mortimer A. Trembley; No. 28, Frank E. Lush and Emslie J. Heartt; No. 29, Frank T. Wells and Samuel P. Hildreth; No. 30, Louisa Ireland and Charles A. Plowright; No. 31, Nelson V. W. Colyer and Elmer W. Davis.

The individual entries are the following: No. 18, George W. Dally and Henry Cottle; No. 19, Grace M. Ireland and Rufus J. Ireland; No. 20, Wilberforce Sully and Adelaide A. Sully; No. 21, Henry F. Stone and Amy Stone; No. 22, Henry P. Walker and Lillian A. Walker; No. 23, Verena Steinle and Frank M. Bradshaw; No. 24, Clara H. Carhart and Elsie C. Carhart; No. 33, Sadie C. Inslee and Helen M. Clifford; No. 36, Janet C. Wood and Evilah Grace Wood.

The charges in the individual entries as served upon the claimants and upon which the hearing proceeded were that "the claimants did not make the entry for their own use and benefit but for the use and benefit of some coal company, mentioning the Northwestern Coal Company and the Owl Creek Coal Company."

In the Owl Creek group the charges as to Nos. 25 and 26 were that "the claimants did not make the entry for their own use and benefit, but for the use and benefit of some coal company, mentioning the Owl Creek Coal Company and the Northwestern Coal Company."

As to the remainder of the Owl Creek group the charges were that "the claimants did not make the entry for their own use and benefit but for the use and benefit of some coal company, mentioning the Owl Creek Coal Company."

In the Northwestern group the charges were that "the claimants did not make the entry for their own use and benefit, but for the use and benefit of some coal company, mentioning the Northwestern Coal Company."

The appellants contend that a charge that a coal entry was not made for the use and benefit of the entryman is insufficient, for the reason that they claim that the coal-land law does not prohibit an entry by a qualified person in the interest of another who is likewise qualified, even if his identity be not disclosed, and further that the entries could not have been made in the interest of the Northwestern Coal Company or the Owl Creek Coal Company, as neither of those corporations were in existence at the time of the entries. The argument is that the sole prohibition in the coal-land law is that no person shall make more than one entry, either individually or as the member of an association, and that until he does make such entry, he is qualified and may have others who are likewise qualified make entries for him as the undisclosed principal.

The Department is unable to concur.

Section 2347 of the Revised Statutes permits entry of coal land, not exceeding 160 acres, by an individual, or 320 acres by an association. Section 2348 permits entry of 640 acres by an association of not less than four persons, upon certain conditions. Section 2350 provides:

The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; . . .

Section 2351 empowers the Commissioner to issue all needful rules and regulations to carry into effect the provisions of the coal-land laws. The above statutes have been construed to some extent both by the courts and the Department.

In the cases of *United States v. Trinidad Coal and Coking Company* (137 U. S., 160) and *United States v. Keitel* (211 U. S., 370) the Supreme Court considered the making of a coal entry by a

qualified entryman in the interest of another who was disqualified by reason of having made an entry himself, or in the interest of an association some of whose members were so disqualified, and held such a transaction to be illegal. A similar transaction was considered in *United States v. Lonabaugh et al.* (158 Fed. Rep., 314), the court saying at pages 316, 317:

They knew that no individual could acquire more than 160 acres of land, that an association or corporation could not acquire more than 320 acres except in one case, for which the statute clearly provides, for such is the plain provision of the statute. But it was urged in argument that because the statute does not in express terms require an affidavit that the entryman is not taking the land for the benefit of another that, therefore, he may lawfully make a contract to sell or convey by deed, if not prior, certainly subsequent, to his making final proof. . . .

The coal-land laws . . . provide that only one entry shall be allowed to the same person or association of persons; and an association of persons, any member of which shall have taken the benefit of such sections of the statute (that is, the sections which contain the provisions allowing them to enter coal lands), either as an individual or as a member of any other association, is prohibited from entering or holding any other lands under the provisions of those sections. So that when these defendants attempted to secure the lands described in the indictment in the manner disclosed by the evidence in this case, they knew that they were committing a fraud, because the very agreement itself provides for doing indirectly what they, as individuals or as members of an association or corporation, could not do directly.

In *United States v. Portland Coal and Coke Company* (173 Fed. Rep., 566) it was held that under section 2347 persons could not lawfully associate themselves together to enter tracts of 160 acres each in severalty, but to be held for the joint benefit of all in equal shares, and that patents issued on entries made under such an agreement would be canceled at the suit of the United States, the court stating at page 569:

The object of the combination was to acquire coal land in excess of 320 acres for an association, although the law fixes the maximum quantity at 320 acres.

In *United States v. Allen et al.* (180 Fed. Rep., 855) it was held that a general plan to secure entries to be made in behalf of a single association in excess of 320 acres was unlawful, and further that where two persons were engaged in such an unlawful combination, the fact that only two claims, aggregating 320 acres, were actually patented to them would not make the patents valid, but that the unlawful combination made the proceeding illegal from its beginning. This holding was affirmed by the Circuit Court of Appeals, 9th Circuit. *Wilson Coal Company v. United States* (188 Fed. Rep., 545).

The subject has also recently been considered by the Supreme Court of Wyoming (*Kennedy v. Lonabaugh*, 117 Pac. Rep., 1079), where the court had under consideration a contract wherein Kennedy and Lonabaugh agreed to secure title to 960 acres of public coal lands in

the interest of H. and M. by securing entries to be made for their benefit by individual entrymen. The court said at page 1081:

The contract of Lonabaugh with Holbrook and McCarthy was, we think, illegal and void as an entirety. Upon the record 160 acres included in the option was deeded land, and title to the remainder, consisting of 960 acres, was then in the United States. It is all conceded to be coal land, and no one otherwise qualified was authorized to enter to exceed 160 acres, but an association of such persons was authorized to enter not to exceed 320 acres of such land. . . . An individual or association of persons is thus limited to the amount of coal land that can be acquired from the United States under this act. It is clear, and is so held by numerous authorities, that a contract similar to the one here involved constituted a conspiracy to defraud the United States of the title to its coal land, and any act in furtherance of such conspiracy would constitute a criminal conspiracy and a crime within the meaning of U. S. Revised Statutes, Sec. 5440. . . . An agreement to acquire title to coal lands of the United States indirectly when it can not be acquired directly constitutes an attempted fraud, and if the apparent title is so procured it constitutes fraud.

The construction of the coal-land laws by the Department harmonizes with the views of the courts. In Adolph Peterson *et al.* (6 L. D., 371) the Department held that the procurement of qualified parties to make coal entries for the benefit of an association renders such entries invalid, saying at page 373:

The entrymen were employees of the company in its mines or on its works and were specially employed by it to make these entries for its benefit, which they did without any expenditure on their part, the money for the lands being actually paid by the company.

If this could be done for one or two entries it could be done for any number. The recognition of such a practice would enable one person or corporation operating through nominal entrymen, who are in fact mere agents, to do what their principals can not legally do, to acquire under sanction of the land department an unlimited quantity of coal lands, or a quantity limited only by the extent of the coal field or by the means or desires of the person or company for whose benefit they are to be made.

But the land department can dispose of the Government coal lands only in accordance with the law, and that as to the real point involved in this case is very specific. It provides that but one entry shall be made by one person or association of persons (section 2350 R. S.), and that such entry, when made under section 2347 of the Revised Statutes, shall be limited to one hundred and sixty acres by one individual person, or three hundred and twenty acres by an association of persons severally qualified.

In the light of these provisions and limitations of the law and of the facts in this case, I am unable to conclude that the entries made in the names of Peterson and Carlson can be recognized as legal or valid. To concede that they are would be to allow that to be done by indirection which can not be done directly. In other words, it would be to allow a corporation to acquire by purchase through agents, acting for the time being in their own names confessedly as agents, that which it can not acquire by direct entry in its own name. This would be to encourage monopoly, while the manifest purpose of the law is to prevent monopoly.

Northern Pacific Coal Company (7 L. D., 422) holds that an entry made under section 2347 of the Revised Statutes for the use and benefit of another is illegal. At page 423 Acting Secretary Hawkins said:

Under the admitted facts of this case, Dixon was but the nominal entryman, the conduit through which the title was to pass to the appellant, by whom the entry was in fact made. If this could be done for one entry it could be done for any number, and the recognition of such a practice, would be to allow that to be done indirectly which the law forbids to be done directly—

and reaffirms the rule laid down in the Peterson case.

Brennan *v.* Hume (10 L. D., 160) held that a coal entry must be made in good faith and not for the benefit of another.

In McGillicuddy *et al.* *v.* Tompkins *et al.* (14 L. D., 633) the Department considered the case of an application to purchase made in the interest of an undisclosed principal disqualified by reason of having himself made entry, and held that such an application could not be allowed.

In Elwood R. Stafford *et al.* (21 L. D., 300) it was again held that a coal-land entry not made for the use and benefit of the entryman is illegal.

In Jessie E. Oviatt *et al.* (35 L. D., 235), the second paragraph of the syllabus reads:

In connection with each coal-land entry the entryman must show, under oath, that the entry is made in good faith in his own and individual interest, and not in the interest, directly or indirectly, in whole or in part, of any other person or persons whomsoever.

At page 237 the Department said:

It is, however, apparent that in such cases as the present, as well as in all others, whether of so-called private entries exclusively under section 2347, Revised Statutes, or entries made in the exercise of preference rights, a further showing by each individual entryman or association, that the entry is made in his or their own exclusive behalf, is necessary in order that the law may be properly administered. Otherwise, nominal entrymen, with money furnished by disqualified persons or associations, might purchase outright large bodies of vacant coal lands for and on behalf of such persons or associations, and thus accomplish by indirection that which can not be done directly.

The provisions of the coal-land laws fully warrant the requirement in all cases that in entries thereunder the entryman shall show under oath that the entry is made in good faith in his own and individual interest, and not in the interest, directly or indirectly, in whole or in part, of any other person or persons whomsoever.

The appellants' argument is based upon the assumption that the sole disqualification is contained in section 2350 and entirely overlooks the limitation upon the area which may be acquired contained in section 2347. This view would permit an individual or association of individuals to acquire an unlimited area of coal lands through entries made in their interest by qualified entrymen by the simple

device of refraining from making an entry themselves. Such a result is prohibited by section 2347 and also is contrary to the views both of the courts and the Department. That part of the appellants' second contention must accordingly be overruled.

Referring to the remaining portion of the defendants' second contention, viz., that the entries could not have been made in the interest of the Northwestern Coal Company or the Owl Creek Coal Company, for the reason that neither of these corporations were in existence at the time, while possibly this portion of the charge could have been stated with greater clearness and accuracy, still taken in connection with the remainder, the whole was sufficiently clear to advise the claimants of the allegations they were called upon to meet. As to this feature, the case of *Salina Stock Company v. United States* (85 Fed. Rep., 339) is instructive. There a bill to set aside patent issued upon desert entries charged in brief that the defendants Nellie and Edward A. Frank and the Salina Stock Company conspired to defraud the United States; that the entries were made in the interest of and for the benefit of the Salina Stock Company, and that in collusion with the Stock Company fraudulent proofs were made. It appears that the Stock Company as a corporation was not in existence at the time of the initial desert-land application, but was at the time of proof and final payment. It was urged that the bill charged a conspiracy with the Salina Stock Company, when in fact that corporation was not organized until after the initiative application for the land. The court, however, disposed of this argument at page 342:

But there is evidence in the record that shows that this company in effect existed as a voluntary association prior to the application. It was composed of the same interested parties who constituted the stockholders and directors of the incorporated concern. As the same association of parties that inaugurated the scheme carried it into the corporation and received the full benefit, and the corporation adopted it and reaped the fruits of the fraud, it was admissible to plead the facts according to their legal effect and to prove them as was done in this case.

The above also disposes in a great measure of the appellants' third contention. The Commissioner's findings were summarized at the conclusion of his opinion as follows:

It is held that not one of the parties to Entries Nos. 18 to 49, inclusive, made application in his own interest, or for his own benefit. The great majority of the applicants did not understand the nature of the transaction, and signed their names at the request of, and as a favor to, one of the several active participants in this scheme. If they did not enter into any specific contract or agreement to convey the lands after entry, they had no intent or purpose to make lawful purchases of these lands. Many of them did not even know that they were signing coal applications. The reason that they were not called upon in advance of making the applications to convey the lands was because it was never intended by those directing this matter that such applicants should know they had any rights to convey. Accepting the testimony of the several applicants themselves,

even those who consciously made application had nothing to do with the selection of the land embraced in their entries. The plan was devised by Alfred Sully, and was carried out under his directions, and the members of his family who participated therein had no independent intention of purchasing these lands. They obeyed his will and acted throughout in his interests.

This is a clear finding that the entrymen did not make their entries for their own use and benefit, and, taken in connection with the entire decision, shows that the Commissioner was of the opinion that the entrymen acted as mere automatons without any interest in their entries, and were controlled by the agents and representatives of Alfred Sully, who was the directing factor in the formation of the two corporations and whose plan it was to secure title to the lands by these means.

The Department is of the opinion that there is no material variance between the charges and the Commissioner's findings.

Upon the merits the decision of the Commissioner, affirming the recommendation of the local officers as to the Owl Creek and Northwestern entries is correct and must be affirmed. It also appears that the testimony in the present case was reviewed by Justice Van Devanter, then a circuit judge, in the case of *United States v. Owl Creek Coal Company*, in the form of an oral opinion rendered at a hearing upon an application for injunction to restrain that company from mining coal on certain tracts here involved. The opinion as appearing in this record is as follows:

The persons who made these entries are not ones to whom Mr. Alfred Sully directly made any suggestions. They are persons who were solicited by Rufus J. Ireland and by Mrs. Myton to make entries. The evidence goes far to show that these persons made the entries merely because they were so solicited; that they hardly read the applications therefor and but illy understood them; that there was at the time no arrangement respecting the purchase price, and that their motive in making the applications was that of doing a favor for Mr. Ireland and Mrs. Myton, (one or the other). Mrs. Myton advanced all monies used in obtaining these entries. When the entries were made the Receiver's receipt and Register's patent certificates were not delivered to the entrymen. They did not know where the purchase price came from and apparently they did not care. They did not expect to be called upon to repay it. Subsequently, and within a short time, a corporation was formed for the purpose of taking over these lands. The entrymen were not consulted about this, and after it was done they were requested by Mr. Ireland and Mrs. Myton to make conveyances to the corporation and did so without questioning the right of Mr. Ireland and Mrs. Myton to make the request. They were then given three certificates of stock in the company, and a very dubious sort of an explanation is given as to why the stock was given to them. They were not participants in any arrangement for the issuance of stock, but merely assented to it as one would assent to anything in which he had no real voice. Two of the stock certificates were transferred by each of them to Mr. Ireland and Mrs. Myton. None of them exercised at any time any sort of active ownership over their entries, save as they made deeds to the Owl Creek Company. None of them made any inquiries about the land and all the way through they manifested

that sort of indifference to the transaction which would be shown by one who was not a real participant for his own benefit. They did not give notes for the purchase price, did not promise to repay it, and never did repay it. All that occurred in that regard was that the corporation, after getting the lands, gave its notes to Mrs. Myton for the amount expended by her. The corporation was created and brought into being by Mr. Ireland and Mrs. Myton, not by the entrymen. The latter have made various statements about the transaction. In their direct examination, in so far as they were examined, they said that they made the entries for the accommodation of Mr. Ireland and Mrs. Myton; that they did not know anything about the purchase price; and that the stock came to them as a surprise, as an unexpected gift. On cross-examination they answered that they made no agreement and had no understanding that they would convey the entries, after the same should be perfected. Thus part of their testimony is inconsistent with the remainder. But this inconsistency does not wholly destroy their testimony. We have the unqualified admission that none of them was looking out for coal entries at all, and that none of them made any inquiries about the matter at any time, but signed whatever papers were placed before them and acted throughout in the same way that people would who were not beneficiaries and were incurring no responsibility at all. Then we have the circumstance that Mr. Ireland and Mrs. Myton would hardly have done what was done out of mere kindly interest in persons with whom they had no family ties and no such relations as naturally would cause them to proceed as they did. We therefore must look for some other motive and my view is that the evidence reasonably will support a finding that Mr. Ireland and Mrs. Myton were to be the beneficiaries of these entries. Maybe the particular manner in which they were to become the beneficiaries, whether through the instrumentality of a corporation and conveyances to it, was not specified, but the manner and means were to be such as Mr. Ireland and Mrs. Myton should name. In my view there is ample evidence upon which the Land Office reasonably and impartially can find that the entire lot of entries that were conveyed to the Owl Creek Coal Company were made by the entrymen, not for their benefit, but in pursuance of a mutual understanding, constituting a moral obligation, that the entries should inure to the benefit of Mr. Ireland and Mrs. Myton and should be conveyed to them or some corporation of their nomination. The number of entries falling within this arrangement were greatly in excess, in point of acreage, of what directly and lawfully could be entered by Mr. Ireland and Mrs. Myton or by any association in which they were members; and this being true, the arrangement could not withstand the test prescribed by the statute.

* * * * *

I base my conclusion upon what the entrymen and other witnesses have said when testifying in the contest proceedings in the Land Office when they were attended by counsel who could by cross-examination help them to be accurate, if they spoke inaccurately, and could call out from them the entire situation, if only part of it would give a false color; and then I contrast their testimony with other indisputable facts and judge of the whole in the light of the common experience of men.

* * * * *

The evidence relating to the North Western Coal Company entries is in many respects strikingly like that relating to the Owl Creek Coal Company, save that these North Western Coal Company entries were solicited by George W. Dally and were apparently made under an arrangement whereby they would inure largely to his benefit.

The Commissioner and the register and receiver have reviewed the evidence at even greater length, and the facts are stated by them *in extenso*. The Department accordingly feels that no further recapitulation of them need be made.

In entry No. 37, William H. Handy and Alfred B. Carhart, there are some facts present which differentiate it in some degree from the remainder of the so-called Northwestern entries. Carhart never conveyed to the Northwestern Coal Company. He was also apparently aware of the price necessary to be paid to the Government and that the money had been forwarded by his aunt, Mrs. Myton. Shortly after entry he gave Mrs. Myton his note for the purchase price, and in June, 1907, conveyed his interest to his mother. His mother paid him by check therefor, and he in turn paid Mrs. Myton in full, copies of the above instruments being contained in the record. However, he apparently entered into an association to purchase 315 acres of land with an individual who was entirely unknown to him, at the instigation and suggestion of Dally. His testimony is not altogether frank, and the Department is of the opinion that Carhart's entry was made in accordance with the general scheme and not for his own use and benefit.

Taking up the individual entries, the Department is of the opinion that the Commissioner's decision is clearly correct, and should be affirmed. The Commissioner's findings as to these is summarized by him as follows:

Those who did not convey their property to either of the corporations named, occupied positions scarcely more favorable than those who did. Wilberforce Sully was a conscious agent in the part that he performed in this fraudulent scheme. Ireland was an active participant in this conspiracy to deprive the Government of its valuable coal lands contrary to law. Mrs. Stone and her infirm husband acted throughout upon the initiative of Mrs. Myton or Dally. Mrs. Carhart not only followed implicitly the directions given her by Alfred Sully, her brother, and Mrs. Myton, her sister, but she, herself, participated by dragging into the scheme Mrs. Wood and Miss Wood. There is nothing to indicate that Walker's connection with this matter was clean. He had been a former employe of Sully, helped to organize the Northwestern Coal Company, and was its first President, although he refused to convey his own lands to it. Miss Inslee was a relative of George W. Dally and her associate, Mrs. Clifford, was a former housekeeper of Alfred Sully. Mrs. Clifford could not be found, and was not produced at the trial, while Miss Inslee was excused from attendance on account of ill health.

Mrs. Wood states that she signed the application because Mrs. Carhart requested her to, and that she felt that it was a disgrace to have her name on the paper.

Dally and Cottle, the parties to the entry directly under consideration, were flagrantly, if not criminally, parties to the fraud.

Dally was the acting and willing agent of Alfred Sully in procuring the signatures of the various dummy applicants, while Cottle evidently disposed of his interests to Alfred Sully before making entry. But whether the sale was made before or after entry is immaterial. Cottle performed the development

work on the various claims, and was paid therefor by money furnished by Alfred Sully, through Gebo. He permitted Dally to enter with him in association and thus secure a half interest in the mine then in operation, and one week after making entry, deeded his interest in the land entered to Alfred Sully.

There are some distinguishing features in connection with entry No. 24, Mrs. Clara H. Carhart and Elsie C. Carhart (now Smith), No. 19, Grace M. Ireland and Rufus J. Ireland, and No. 20, Wilberforce Sully and Adelaide A. Sully. These entrymen were relatives of Alfred Sully and Mrs. Myton and all gave their written or oral obligations to repay the amount advanced. All were financially able to repay and all did later repay out of their own fund. However, the Department is of the opinion that these entries were made in pursuance of the general scheme and that the parties were participants in the attempted fraud and that as to them also the Commissioner's decision must be affirmed.

Memorandum decisions in harmony herewith will be rendered and filed in each entry, the Commissioner's decision as to entry No. 18, George W. Dally and Henry Cottle, being hereby affirmed.

GEORGE W. DALLY ET AL.

Motion for rehearing of departmental decision of January 3, 1912, 41 L. D., 295, denied by First Assistant Secretary Adams, November 21, 1912.

CONRAD WILLIAM BOESCHEN.

Decided June 6, 1912.

SILETZ INDIAN LANDS—ACT OF MARCH 4, 1911—RESIDENCE.

The act of March 4, 1911, providing for the issuance of patent upon homestead entries within the former Siletz Indian reservation where the entryman had built a house on the land and actually entered into occupation thereof and cultivated a portion of the land for the period required by law, is a remedial act intended to relieve *bona fide* claimants from the rigid requirement of *actual* residence for the period of three years contained in the act of August 15, 1894, but does not wholly dispense with residence; and one claiming the benefit of the act of 1911 must show efforts to comply with the provisions of the act of 1894, respecting residence and cultivation, evidencing *bona fide* intent to make it his home and develop it as a farm.

ADAMS, *First Assistant Secretary*:

Conrad William Boeschén appealed from decision of the Commissioner of the General Land Office of August 31, 1911, denying

his application to reinstate his homestead entry for S. $\frac{1}{2}$ of S. $\frac{1}{2}$, Sec. 10, T. 10 S., R. 11 W., W. M., Portland, Oregon.

The land is within the former Siletz Indian Reservation. Boeschén made entry March 22, 1904, on which he offered final proof November 22, 1904, claiming that he established residence in 1900. Final certificate was withheld for investigation. January 26, 1907, Ezra S. Booth filed contest alleging failure to establish residence and noncultivation. The contest was allowed October 2, 1907; hearing was had at the local office December 30, at which both parties appeared with counsel, and testimony was taken. The local office found for contestant and recommended cancellation of the entry. The decision, after successive appeals, was affirmed by the Department May 22 and motion for review denied September 3, 1909, and the entry was canceled as result of the contest March 11, 1910. Contestant made no entry, as the land had in meantime been withdrawn for classification. Contestant's application for entry under his successful contest was denied and the case finally closed, April 25, 1911.

March 27, 1911, Boeschén's counsel applied for reinstatement of his entry under act of March 4, 1911 (36 Stat., 1356). This application was denied by the Commissioner, and the pending appeal is from that decision.

The act referred to provides:

That all pending homestead entries heretofore made within the former Siletz Indian Reservation in Oregon upon which proofs were made prior to December thirty-first, nineteen hundred and six, shall be passed to patent in all cases where it shall appear to the satisfaction of the Secretary of the Interior that the entry was made for the exclusive use and benefit of the entryman, and that the entryman built a house on the land entered and otherwise improved the same, and actually entered into the occupation thereof and cultivated a portion of said land for the period required by law, and that no part of the land entered has been sold or conveyed, or contracted to be sold or conveyed by the entryman, and where no contest or other adverse proceeding was commenced against the entry and notice thereof served upon the entryman prior to the date of submission of proof thereon, or within two years thereafter, and where any such entry has heretofore been canceled the same may be reinstated upon application filed within six months from the passage of this act where at the date of the filing of such application for reinstatement no other entry is of record covering such land: *Provided*, That nothing herein contained shall prevent or forestall any adverse proceedings against any entry upon any charge of fraud: *And provided further*, That any entryman who may make application for patent under the provisions of this act shall, as an additional condition precedent to the issuance of such patent, be required to pay to the United States the sum of two dollars and fifty cents per acre for the land so applied for; and the Secretary of the Interior is hereby authorized to issue such regulations as may be necessary for carrying this act into effect.

This act requires as condition to reinstatement of the entry: (1) That it was made for the entryman's sole benefit; (2) that he build

and occupy a house on the land, and otherwise improve it; (3) cultivate a part of the land for the period required by law (three years); (4) that no part of the land has been sold, conveyed, or contracted to be; (5) that no contest or adverse proceeding was commenced against the entry, and notice served upon the entryman prior to submission of final proof or within two years thereafter. In the present case the first, fourth, and fifth conditions sufficiently appear. The question presented is: Whether the second and third conditions to reinstatement were performed or existed in the case. Before proceeding to consideration of this question, it is proper to note that this is clearly a remedial act and is to be administered for relief of entrymen who performed the acts required, and every reasonable intendment should be indulged to advance and effectuate the remedy. Congress had made the Siletz lands subject to homestead entry only. They were heavily timbered and a homestead entryman was confronted by great difficulty. This the act, in effect, recognizes, and permits a cash entry at two dollars and fifty cents per acre in any case where the entryman can show that he has made an honest effort in good faith to take the land as a homestead and develop it as a farm. However, under the most liberal interpretation of the law, it is impossible to find in favor of Boeschen. The evidence in brief is as follows:

Boeschen's application is supported by the affidavits of himself and corroborating witnesses—Crosno and Arthur C. Boeschen, son of the entryman—making separate affidavits. As to residence and cultivation, Crosno, in substance, says:

As far as I know Mr. Boeschen planted various crops of potatoes, beans, carrots, peas, and hay each year during 1901–2–3–4, but on account of the extreme height of the trees around his clearing some years the potatoe crop would be light or the beans would not grow strong for lack of sunlight; his first house, 10 by 12 feet, was built in 1900 and the second, 12 by 20 feet, in 1904; about a quarter acre was cleared each year until one and one-quarter acres were cleared and fenced; he planted an orchard of perhaps a dozen strong growing young apple trees that were in good condition and vigorous growth in fall of 1904; in September 1903 to March 1904 he was dangerously ill with typhoid fever and not able to live on his homestead. When he submitted final proof the cleared part of his claim was in a clean state of clearing and cultivation, with growing crops and healthy young orchard; he had a good roomy, comfortable house, with windows, doors, cooking and heating stove, bedstead, chairs, table, bedding, and a full stock of provisions of all kinds.

The affidavits of Boeschen and his son are substantially alike, and to the effect that:

He entered into actual occupation of the land July, 1900, and immediately built a house, 12 by 20 feet, furnished with a stove, bedstead, plenty of bedding, three chairs, table, cooking utensils, and a good supply of provisions and food which were kept there until his final proof. He cleared a quarter acre in 1901; in 1902 planted it to potatoes, garden and field vegetables, and grass, and har-

vested the crop. In 1902 he cleared another quarter acre; in 1903 planted three-fourths of an acre to potatoes, onions, carrots, and other garden vegetables and hay, and raised a substantial crop; planted twelve fruit trees in 1903, cleared a quarter of an acre more; in 1904 planted the acre to hay, potatoes, onions, carrots, and a large patch of beans, and various other garden and field vegetables; harvested and consumed the crop. Each of the three crops was cultivated carefully and an acre was substantially fenced. In 1900 he was present on the land ten days, returned in October, was present ten days, and after that returned to the claim every two or three months, not being absent more than about three months, and each time stayed a week or ten days. From October, 1900, he was absent six months while ill of typhoid fever, then returned to remain ten days, and thereafter returned every two or three months, not being absent more than three months at one time, and remaining a week or ten days each time until final proof November, 1904.

These affidavits are noticeably vague and indefinite as to the quantity of crops and the result of his planting and cultivation. This, however, is not the only evidence in the record which needs to be considered.

In Booth's contest four witnesses testified on behalf of contestant. E. J. Smith first saw the land in 1899, before Boeschen's settlement, and from time of Boeschen's settlement passed by it frequently once or twice a month; saw Boeschen's first cabin soon after it was built and during the whole period of Boeschen's claimed settlement never saw him there. The cabin was too low for a man of Smith's height, five and a half feet, to stand erect in. Smith several times saw signs that some one had been there, but the place did not appear to be a habitation. In 1904, before final proof, an addition was built to Boeschen's second cabin, constructed of shakes, but never had a door or window, so far as Smith ever saw. There was a sheet-iron stove in the shake cabin, with two joints of stove-pipe, but no pipe-hole in the roof, showing that the stove was never set up. The only signs of cultivation that Smith ever saw was a piece of ground, variously estimated at four to ten feet, by six to twelve feet, in size, that had been spaded up.

Edward J. Marvin lived on the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of Sec. 11, his land cornering with Boeschen's. This witness lived on his claim from early in 1905 until September, 1906, with his wife and child. In February, 1905, he stopped at Boeschen's cabin over night. There had never been any fire in Boeschen's stove, or a pipe in the roof or side of his cabin. There was no spaded or cultivated ground on Boeschen's claim, except the small piece mentioned by Smith.

Lewis Culbertson went to the Siletz in February, 1905, and took up the S. $\frac{1}{2}$ of N. $\frac{1}{2}$ of Sec. 10, separated from Boeschen's claim a quarter of a mile. He corroborates Marvin's testimony in every particular.

The two last-mentioned witnesses went to the immediate neighborhood in the winter following the summer that Boeschen testifies he

cultivated more than an acre of land. No growing season had intervened between Boeschen's supposed cultivation of more than an acre and their becoming residents of the immediate neighborhood. It could not be that an acre of cultivated land had in the meantime grown up to undergrowth and evidence of cultivation had been lost. They saw no fences, except a few scattered pickets driven into the ground, not making an enclosure, but defined in the woods the outline of ground Boeschen claims to have cleared. There is no evidence of deadening of timber or of the cutting of any timber, except such as was necessary for the construction of Boeschen's cabin. Otherwise, the claim was in its native forest state, with slight clearing away of brush among the trees. These witnesses were cross-examined by counsel for Boeschen in an adversary proceeding, wherein the existence and good faith of his alleged improvements was the very matter in controversy. No question on cross-examination suggested that a real clearing existed or any deadening of trees had been done. The conclusion is irresistible that the testimony of these witnesses was true, and that no clearing in fact was done, except slight cutting away of undergrowth or brush around the cabin.

To fully understand this remedial law it must be remembered that under act of August 15, 1894 (28 Stat., 323, 326), providing for disposal of lands in the Siletz Indian Reservation, a homestead entryman was required to show, as a prerequisite to patent, that he had established and maintained *actual* residence upon the land for a period of three years. (Adams v. Coates, 38 L. D., 179.) It was to relieve *bona fide* claimants from rigid construction of "*actual* residence" for a period of three years that the act under consideration was passed, but it did not wholly dispense with residence, as would seem to be contended. While it was thereby required merely that the entryman shall show he had "actually entered into the occupation thereof and cultivated a portion of said land for the period required by law," it meant that he should show a substantial effort to comply with the purpose of the law of 1894, which clearly contemplated use of the land as a home and usual place of abode.

The record here shows Boeschen's "house" was never put in shape for actual habitation, and leaves it at least doubtful whether he built what could properly be called a house; the alleged cultivation by spading a few feet in extent among growing trees, whose shade precluded growth and maturity of any possible crop, was but a sham, showing he did not hope or expect to obtain a product of any kind, and his visits to the land were so infrequent and his stays so brief as to exclude the idea of actual occupation of the land as a home.

It is true the *ex parte* affidavits furnished with Boeschen's present application for reinstatement are more favorable to him than the showing made in the contest proceedings, before referred to, where

witnesses were subjected to cross-examination; but the whole record fails to show that claimant "built a house on the land entered and otherwise improved the same, and actually entered into the occupation thereof and cultivated a portion of said land for the period required by law."

The decision appealed from is therefore affirmed.

CONRAD WILLIAM BOESCHEN.

Motion for rehearing of departmental decision of June 6, 1912, 41 L. D., 309, denied by First Assistant Secretary Adams October 23, 1912.

HOLMAN ET AL. v. STATE OF UTAH.

Decided July 15, 1912.

MINERAL LANDS—DEPOSITS OF CLAY AND LIMESTONE.

The mere fact that land contains deposits of ordinary clay, or of limestone, is not in itself sufficient to bring it within the class of mineral lands and thereby exclude it from homestead or other agricultural entry, even though some slight use may be made commercially of such deposits. There may, however, be deposits of clay or limestone of such exceptional nature as to warrant the classification of the lands containing them as mineral lands.

ADAMS, *First Assistant Secretary*:

This is an appeal by A. Holman *et al.* from the decision of the Commissioner of the General Land Office of April 6, 1911, affirming the recommendation of the register and receiver and dismissing their protest against indemnity school land selections, Nos. 1435-6-7-8-9 and 1468, filed February 15 and March 12, 1907, by the State of Utah at Salt Lake, Utah, except as to the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 9, T. 5 S., R. 2 E., S. L. M. The protest charged, as stated in the notice of hearing issued by the register and receiver, that the following tracts, the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 5, NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 8, S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$, Sec. 9, T. 5 S., R. 2 E., contained—

valuable deposits of fire clay, gold, silver and copper and are more valuable for mineral than for agricultural purposes; that mining claims have been located thereon and mineral mined therefrom and sold at a profit; that on the lime-kiln claim \$500 has been expended in development work and that lime in paying quantities has been manufactured and sold therefrom; that on the Tunnel lode \$800 has been expended, that a tunnel some 300 feet in length has been run, 20 feet of which is in a valuable deposit of fire clay.

At the hearing, the NW. $\frac{1}{4}$, Sec. 5, was excluded from the protest. The register and receiver found that the protest had not been sustained, except as to the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 9, which contained a quarry of limestone and a limekiln.

The State of Utah has not appealed from either of the decisions below. After careful consideration of the entire record, the Department finds that the allegations of the protest have not been sustained as to the subdivisions now under consideration by virtue of the appeal.

It is not the understanding of the Department that Congress has intended that lands shall be withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country. It might pay to use any particular portion of these deposits on account of a temporary local demand for lime or for brick. If, on account of such use or possibilities of use, lands containing them are to be classified as mineral, a very large portion of the public domain would, on this account, be excluded from homestead and other agricultural entry. It is safe to say that every kind of material found in land in its natural state may under some circumstances be put to non-agricultural uses. Local demand for building of levees or railroad embankments, filling up low places and the like, may make any particular land more valuable for the time on account of the material it contains than on account of its agricultural possibilities, but it is clear that such considerations can not be given weight in determining what lands are reserved for special disposition because mineral in character. In one sense, all land except portions of the top soil is mineral. The term, however, in the public-land laws is properly confined to land containing materials such as metals, metalliferous ores, phosphates, nitrates, oils, etc., of unusual or exceptional value as compared with the great mass of the earth's substance. It is not intended hereby to rule that there may not be deposits of clay and limestone of such exceptional nature as to warrant entry of the lands containing such deposits under the mining laws.

With this modification, the decision appealed from is affirmed.

HOLMAN ET AL. v. STATE OF UTAH.

Motion for rehearing of departmental decision of July 15, 1912, 41 L. D., 314, denied by First Assistant Secretary Adams, October 19, 1912.

CATE v. NORTHERN PACIFIC RY. CO.

Decided August 20, 1912.

ENLARGED HOMESTEAD—QUALIFICATIONS.

The holding of 160 acres by desert-land entry does not disqualify an applicant under the enlarged homestead act from making entry under that act for the full amount of 320 acres.

ALIEN SETTLER—DECLARATION OF INTENTION.

Where an alien settler declared his intention to become a citizen of the United States on the same day he filed his application to make homestead entry for the land settled upon, the land department will not inquire as to the particular hour of the day such declaration was made, with a view to ascertaining whether it was prior or subsequent to the hour of filing of the application to enter.

SETTLEMENT UPON UNSURVEYED LAND IN EXCESS OF 160 ACRES.

Prior to the act of August 9, 1912, a settlement right to unsurveyed land could not attach to more than 160 acres; and one claiming a larger area by virtue of settlement on unsurveyed land prior to that date will be required to elect which part, not exceeding 160 acres, he will retain and enter.

ADAMS, *First Assistant Secretary*:

The Northern Pacific Railway Company appealed from decision of the Commissioner of the General Land Office of October 31, 1911, canceling its indemnity selection for N. $\frac{1}{2}$, Sec. 9, T. 5 N., R. 59 E., M. M., Miles City, Montana.

June 8, 1909, the land was selected by the railway company, on which date plat of survey was filed in the local office. The land was designated under act of February 19, 1909 (35 Stat., 639), on May 1, 1909. September 4, 1909, Hosea A. Cate filed a second homestead application under act of February 8, 1908 (35 Stat., 6), for the same land, with an affidavit alleging settlement thereon March 28, 1909. September 7, 1909, the local office rejected the application because Cate stated in his affidavit that he had made an entry May 31, 1906, Miles City, Montana, for other land, which he abandoned February 26, 1909, receiving no consideration therefor, and relinquishing the entry, which was not canceled for fraud. A second ground for rejecting the application was that it conflicted with the railway company's selection. December 10, 1910, the Commissioner on Cate's appeal reversed that action and directed a hearing between Cate and the railway company as to superiority of claim. March 14, 1911, hearing was had, the railway company being represented by attorney and Cate appearing in person aided by counsel. June 19, 1911, the local office found for Cate and recommended allowance of his entry. The Commissioner affirmed that action.

The appeal here alleges error in finding that the former entry was relinquished without valuable consideration; in finding that Cate was

a *bona fide* entryman at date of the railway company's selection or a settler in good faith under the homestead laws; in holding that Cate was qualified to make the entry, he having at the time a 160-acre desert-land entry.

The first assignment challenges the adverse concurring findings of the local office and the Commissioner. On examination of the evidence, it appears that the findings of fact are fully sustained by evidence in the record. While the evidence is somewhat conflicting, the weight of it is clearly with the settler. It was somewhat suspicious that just previous to his relinquishment Cate sold a quarter section of land adjoining his former homestead entry for the price of \$4200, and soon after mailed his relinquishment of his homestead entry to the local office; but the weight of evidence is, that the land sold for \$4200 was considerably more valuable than the adjoining quarters in the same section which witnesses valued at \$19 and \$21 per acre. The land sold was more valuable by fifty per cent in judgment of the agent who managed these sales. It was smooth, and all of it lay so that a reaper could go over its entire surface, while the other land was considerably broken and contained several buttes, making it less valuable for agricultural purposes. As to any understanding or agreement that Cate should relinquish his entry, there is but a single witness, Roscoe Clark, then son-in-law of Dudley, the purchaser, but who is now not so related, and seemingly a hostile witness. His evidence is clearly overborne by that of Daisy Clark, his former wife, Dudley, the purchaser, and Walters, the real estate agent who managed the transaction of selling the deeded land. The fair conclusion from the evidence is that Cate, seeing opportunity to obtain a better claim on land about to become subject to entry, preferred to abandon his former one and thereby improve his condition.

The evidence clearly shows that about March 28, 1909, Cate settled on the land here in controversy; built a house, 16 by 16, a barn, 16 by 24; broke forty acres, put it in crop and fenced it; dug a well, fifty feet deep. He moved onto the claim with his family April, 1909, but afterward moved to the desert-land claim of his wife, on November 10, 1909, where she had a more commodious house. He has not abandoned his claim on the land in controversy, though he has not resided there continuously since. He disked and cropped the land four times and kept his fence in repair. When his original house was removed in his absence, he built another. The failure to keep continuous residence on his claim is mitigated by the fact that an entry was not allowed him. To this time he has been unable to obtain entry, and in that state of uncertainty has not ventured to build such a house as his wife deemed necessary for the comfort of the family. Nothing, however, tends to show that his original settlement and residence was not *bona fide*. As it appears to have been a *bona fide* set-

tlement claim, the land was not subject to the railway company's selection.

Cate's qualification to make entry is questioned on two grounds: First, his holding of one hundred and sixty acres of land under the desert-land entry, and, second, a question of his citizenship.

Construing the act of February 19, 1909, *supra*, the Department by instructions of December 14, 1909 (38 L. D., 361), held:

If, however, a person is a qualified entryman under the homestead laws of the United States, he may be allowed to enter 320 acres under this act, or such a less amount as when added to the lands previously entered, or held by him under the agricultural land laws shall not exceed in the aggregate 480 acres.

Cate's holding of one hundred and sixty acres by desert-land entry did not disqualify him to make entry under the act of February 19, 1909, for the full amount of three hundred and twenty acres. He was a qualified homesteader, and the right was specifically enlarged by the act from one hundred and sixty to three hundred and twenty acres.

The second question of his qualification rests upon the fact that, being an alien, he did not declare his intention to become a citizen of the United States until the day of his homestead application. The railway company insists that inquiry should be had as to the moment or hour of day when his intent was so declared. The Department sees no reason to grant such request or to hold that failure to obtain a filing of his declaration of his intent until a later hour of the day than his homestead application, should deprive a settler otherwise qualified, who has pursued his purpose of acquiring a home on the public domain, from consummation of his desire.

The Department notes that a settlement right to unsurveyed land could not attach to more than one hundred and sixty acres, until the act of August 9, 1912 (Public, 258). This point was not adverted to in your decision or in the appeal. Cate will therefore be required to elect promptly what part, not exceeding one hundred and sixty acres of his claim, he will retain and enter, and as to the residue, the railway company's selection will be allowed to stand.

The decision appealed from is so modified.

CATE v. NORTHERN PACIFIC RY. CO.

Motion for rehearing of departmental decision of August 20, 1912, 41 L. D., 316, denied by First Assistant Secretary Adams, November 27, 1912.

JENNIE TSCHIRGI.

Decided September 4, 1912.

DESERT ENTRY OF LANDS WITHDRAWN FOR COAL CLASSIFICATION.

Where a desert entry of more than 160 acres has been allowed for lands withdrawn for examination and classification with respect to coal value, the entryman will be required, under the provisions of sections 1 and 2 of the act of June 22, 1910, to amend his entry so as to reduce the area to 160 acres and to show that the application is made in accordance with and subject to the provisions and reservations of that act.

COAL LANDS—REQUEST FOR RECLASSIFICATION—ACT OF JUNE 22, 1910.

The provision in section 3 of the act of June 22, 1910, according applicants for lands classified as coal an opportunity to disprove such classification and secure a patent without reservation, applies only to lands which have been *classified* as coal, and can not be invoked by an applicant for lands which have been merely withdrawn with a view to classification.

ADAMS, *First Assistant Secretary*:

The land involved herein is the NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 17, T. 57 N., R. 85 W., Buffalo, Wyoming, land district, aggregating 240 acres, and the case is before the Department upon the appeal of Jennie Tschirgi from the decision of the Commissioner of General Land Office of August 14, 1911, allowing her thirty days within which to relinquish two legal subdivisions of her desert land entry, made for the above described land, December 5, 1910, so that the area thereof shall approximate 160 acres; and also requiring her to signify in writing her consent that her entry be amended and made subject to the provisions and reservations of the act of June 22, 1910 (36 Stat., 583).

It appears that the described tracts were withdrawn for examination and classification with respect to coal value by executive order of October 12, 1910.

With claimant's appeal from the Commissioner's decision she has filed her affidavit, alleging that the land embraced in her entry is not subject to the act of June 22, 1910, for the reason that the same "is not chiefly valuable for coal now or at the time claimant filed upon the same;" that if it has been classified as coal land, she appeals for reclassification and stands ready to prove that it is not chiefly valuable for coal, but for agricultural purposes, and "asks a hearing upon that proposition and for a reclassification."

It is also alleged in said affidavit that the land is of little value without water, and that claimant has gone to great expense for the purpose of irrigating the same, under the desert land act, and has purchased an enlargement of a ditch for three feet of water per second of time, also three shares in a tunnel, which will supply the land with water, and that she should not be required to relinquish

any of her said entry as she is entitled to the same without reference to said act of June 22, 1910.

It is provided by section 1 of said act, that from and after its passage, lands "which have been withdrawn or classified as coal lands or are valuable for coal" shall be subject to entry under the homestead laws by actual settlers only, the desert land law, selection under the Carey Act, and to withdrawal under the reclamation act of June 17, 1902, "with a reservation to the United States of the coal in such lands and of the right to prospect for, mine and remove the same. But no desert entry made under the provision of this act shall contain more than 160 acres."

In section 2 of said act it is provided, that thereafter it must be stated in such application for entry, selection or notice of withdrawal, that "the same is made in accordance with and subject to the provisions and reservations of this act."

While it is provided in section 3 of said act, "that nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter or select, under the land laws of the United States, lands which have been classified as coal lands, with a view of disproving such classification and securing a patent without reservation," it will be noted that this case does not come within said provision, as the land involved does not seem to have been *classified* yet under the withdrawal. In view of the situation disclosed the entry must be held to have been made under section 1 of said act of June 22, 1910, and is subject to the provision that such entries shall not contain more than 160 acres, also to the requirement in section two of said act as to the statement to be made in the application.

Accordingly, the decision appealed from is affirmed.

JEFFERSON-MONTANA COPPER MINES CO.

Decided September 5, 1912.

LODE MINING CLAIM—~~Discovery~~.

The requirement of section 2320, Revised Statutes, that there must be a discovery of a vein or lode of quartz or other rock in place, bearing gold or other valuable deposits, to support a lode mining location, is mandatory and can not be waived by the Department.

ELEMENTS NECESSARY TO CONSTITUTE DISCOVERY OF A LODE.

To constitute a valid discovery upon a lode mining claim three elements are necessary: (1) There must be a vein or lode of quartz or other rock in place; (2) the quartz or other rock in place must carry gold or some other valuable mineral deposit; and (3) the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.

ADAMS, *First Assistant Secretary*:

May 15, 1907, the Jefferson-Montana Copper Mines Company filed mineral application for patent (serial 01204) at Helena, Montana, for the Vorce, Crobaugh, Loren, Potter, Bayliss, Tarbell, Bauder, Stockwell, Sanford, Skeels, Fraction and Divide Nos. 1, 2, 3 and 4 lode mining claims, surveys Nos. 8264 to 8277, inclusive, and No. 8279. Receiver's receipt was issued September 23, 1907, but final certificate was withheld, due to a protest by a field officer of the General Land Office. Thereafter, a hearing was had upon the following charges, preferred by a field officer:

(1). That the mineral claimants have discovered no veins or lodes in any of the discovery shafts and cuts or at any other point on the Divide No. 1, Divide No. 2, Divide No. 3, Divide No. 4, Bayliss, Tarbell, Potter, and Bauder claims.

(2). That the mineral claimants have not expended the required amount in developing and improving said Divide No. 1, Divide No. 2, Divide No. 3, Divide No. 4, Bayliss, Tarbell, Potter, and Bauder claims.

After a hearing, the register and receiver found that the first charge had been sustained, that, there being no valid discovery upon these claims, the shaft upon the Vorce claim could not be accredited as a common improvement to them, and that, therefore, the second charge had also been sustained. Upon appeal, the Commissioner, in his decision of December 19, 1910, found that the first charge had been sustained and that the application must be rejected as to the Divide Nos. 1, 2, 3 and 4, the Bayliss, Bauder, Tarbell and Potter, without passing upon the second charge.

Section 2320, Revised Statutes, provides:

Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.

The mining laws were passed for the development of the mineral resources in the public domain of the United States and should therefore receive a liberal interpretation. Under the above section, however, the requirement of a discovery of a vein or lode "of quartz or other rock in place bearing gold . . . or other valuable deposits" is mandatory and can not be waived by the Department, no matter how desirable such a waiver might be in order to meet the peculiar conditions existing in some mining district. The difficulty arises chiefly in the application of the law and in solving the question of what constitutes such a vein or lode. This question has been often considered, both by the courts and the Department, the deci-

sions being too numerous for a reference to all. The Department will refer to but a few which, in its judgment, cast the most light upon the question as presented in this particular case.

In the case of *Castle v. Womble* (19 L. D., 455), the Department laid down the following general rule:

A mineral discovery, sufficient to warrant the location of a mining claim, may be regarded as proven, where mineral is found, and the evidence shows that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

In *Book v. Justice Mining Company* (58 Fed. Rep., 106), Judge Hawley interpreted the statute as follows:

The statute was intended to apply to any kind of a vein or lode of quartz or other rock in place, bearing mineral, in whatever kind, character, or formation the mineral might be found. The statutes should be so construed as to protect locators of mining claims who have discovered rock in place, bearing any of the precious metals named therein in sufficient quantity to induce them to expend their time and money in prospecting and developing the ground located. When the locator finds the rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether its assays high or low. It is the finding of the mineral, in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants a location of a mining claim to be made.

In *Shoshone Mining Company v. Rutter et al.* (87 Fed. Rep., 801), the Ninth Circuit Court of Appeals considered the following state of facts at page 807:

The discovery was made in running a tunnel, where small seams of iron oxide, quartz, and small quantities of carbonate of lead were found, two or three inches wide. These indications were of such character as miners in that district would follow in the expectation of finding ore, and such as would justify miners in working a claim for that purpose. The rock in these seams was different from the country rock, and was of such character as is designated by the witnesses, who were practical miners, "as a vein containing rock in place, bearing minerals." These facts show that the location was made in good faith, and not "simply upon a conjectural or imaginary existence of a vein or lode," which can not be permitted. . . . The seams, containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued developments *thereon* had resulted in establishing the fact *that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value.*

In *Henderson et al. v. Fulton* (35 L. D., 652), the Department, after exhaustively reviewing the history of the mining laws and the decisions thereunder, laid down the following propositions at page 662:

(1) That to determine whether lands containing a given mineral deposit are of the class subject to location and patent under the law applicable to vein or lode claims, resort is to be had to the language of the statute, rather

than to definitions of the terms "vein," "lode," and "ledge" given by geologists from a scientific viewpoint.

(2). That the statute is to be construed in the light of the prevailing and commonly known use of the terms "vein," and "lode," as defined by miners—the result of practical experience in mining, so as to avoid any limitation in the application of the law which a scientific definition of the terms might impose; and as well in the light of the general purpose and policy which Congress had in view, namely, the protection of *bona fide* locators of the mineral lands of the United States, and the development of the mineral resources of the country. The definitions by the courts are not the definitions of geologists; and the terms are to be considered as used in the signification which they convey to the practical miner, and not in the sense generally used by the scientific man.

The question has been recently considered by the Department in East Tintic Consolidated Mining Claim (40 L. D., 271), wherein it was, at page 273, said:

By the term "vein or lode," as used in the foregoing, the Department is not to be understood as having had in mind merely a typical fissure or contact vein, but, rather, any fairly well defined zone or belt of mineral-bearing rock in place.

It is evident from the record before the Department that the deposits alleged to have been exposed on these claims are regarded by the applicant as possessing practically no economic value, but that, on the other hand, title to the claims is sought essentially on account of their possible value for certain unexposed deposits supposed to exist at considerable depth beneath the surface, and having no connection, so far as shown, with any deposits appearing on the surface. The exposure, however, of substantially worthless deposits on the surface of a claim; the finding of mere surface indications of mineral within its limits; the discovery of valuable mineral deposits outside the claim; or deductions from established geological facts relating to it; one or all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral deposit exists within the claim, will neither suffice as a discovery thereon, nor be entitled to be accepted as the equivalent thereof. To constitute a valid discovery upon a claim for which patent is sought there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes; and before patent can properly be issued or entry allowed thereon, that fact must be shown in the manner above stated.

After a careful consideration of the statute and the decisions thereunder, it is apparent that the following elements are necessary to constitute a valid discovery upon a lode mining claim:

1. There must be a vein or lode of quartz or other rock in place;
2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;
3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.

It is clear that many factors may enter into the third element: The size of the vein, as far as disclosed, the quality and quantity

of mineral it carries, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not.

The claims here involved form a compact group 4,200 feet long by 3,000 feet wide, with due north and south side lines and east and west end lines, the Fraction being a small triangle located at the northeast corner of the rectangle so formed. The Divide Nos. 1, 2, 3 and 4 are situated at the west end of the group. It appears that the area, exclusive of that portion covered by the Divide Nos. 1, 2, 3 and 4, was originally claimed by one McCabe. McCabe interested Mr. A. H. S. Bird who agreed to have location surveys made for a one-third interest in the ground. The claims were then surveyed out in their present shape by a mineral surveyor, it being Bird's opinion that a valid mineral discovery could be made anywhere within their limits. The discovery shafts were then dug, at intervals of 600 feet, in close proximity to the end lines common to the northern and southern tiers of claims.

The country rock is a granite, called an altered granite by some of the witnesses, of which quartz is a constituent part. The quartz has been segregated in places. Some of the witnesses for the applicant are of the opinion that the granite is similar in character to the basic granite of the Butte district, which is some fifty miles distant. It apparently is their position that, wherever this granite with segregations of quartz has been found, a discovery has been made. The Department can not concur, as this in reality accepts the country rock as a discovery. After a careful review of the entire record, the Department is satisfied that there has been no discovery of a vein or lode upon Divide Nos. 1, 2, and 3 and the Tarbell and Bauder claims. It is true that Mr. McElroy, in the plat accompanying his report shows a mineralized dike or ledge traversing the Bauder and the Tarbell, but the testimony fails to disclose its existence.

As to the Bayliss, Potter and Divide No. 4 claims, the case is different. After a careful consideration of all the testimony, the Department finds that upon these three claims there has been a valid discovery of a vein or lode.

The Department accordingly is of the opinion that the charge of nondiscovery has been sustained as to the Divide Nos. 1, 2, and 3, the Tarbell, and the Bauder, and has not been sustained as to the Bayliss and Potter claims. The present application can not be allowed as to the Divide No. 4 for the reason that it is rendered noncontiguous in fact to the remainder of the group by the rejection of the above

invalid locations. The Commissioner did not pass upon the question of whether the shaft upon the Vorce claim could be accredited as a common improvement. The matter is accordingly remanded for adjudication by the Commissioner as to that question as far as it concerns the Bayliss and Potter claims.

The Commissioner's decision, rejecting the application as to the Divide Nos. 1, 2, 3 and 4, the Tarbell and the Bander claims, is affirmed, and reversed as to the Bayliss and Potter, the matter being remanded for further proceedings in harmony herewith.

THREE-YEAR HOMESTEAD—ELECTION—ACT OF AUGUST 24, 1912.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, October 1, 1912.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: Your attention is directed to the following provision in the act approved August 24, 1912 (Public, No. 302), making appropriation for sundry civil expenses of the Government for the fiscal year ending June 30, 1913:

That the failure of a homestead entryman to give notice of election of making his proof as required by the act of June sixth, nineteen hundred and twelve, being an act to amend sections twenty-two hundred and ninety-one (2291) and twenty-two hundred and ninety-seven (2297) of the Revised Statutes of the United States, relating to homesteads, shall not in anywise prejudice his rights to proceed in accordance with the law under which such entry was made.

In view of the foregoing, paragraph 22, circular No. 142, of July 15, 1912 [41 L. D., 103], is no longer in force.

In this connection you will observe the following provisions of paragraphs 18 and 19 of said circular:

(18) By the section I am authorized, under rules and regulations to be prescribed by me, to reduce the required area of cultivation. Acting thereunder, I have prescribed the following rule to govern action on proof where the homestead entry was made prior to June 6, 1912, but, through failure of election, must be adjudicated under the new law.

Respecting cultivation necessary to be shown upon such an entry, in all cases where, upon considering the whole record, the good faith of the entryman appears, the proof will be acceptable if it shows cultivation of at least one-sixteenth for one year and of at least one-eighth for the next year and each succeeding year until final proof, without regard to the particular year of the homestead period in which the cultivation of the one-sixteenth was performed.

(19) The new law also requires that the proof shall be made within five years from date of entry, and if the entry is to be administered under that law the department is not authorized to extend the period within which proof may be made, but when submitted after that time, in the absence of adverse claims, the entry may be submitted to the board of equitable adjudication for confirmation.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

LONG v. LEE.

Decided October 7, 1912.

RECLAMATION—SECOND-FORM WITHDRAWAL—CONTEST—PREFERENCE RIGHT.

Where prior to the regulations of October 15, 1910, a contest was properly initiated, under then-existing laws and regulations, against an entry within a second-form withdrawal under the reclamation act, and the entry was canceled as a result of such contest after the act of June 25, 1910, either prior or subsequent to October 15, 1910, the contestant thereby acquired a preference right of entry to the lands involved, notwithstanding the limitations contained in said act of June 25, 1910, as to entries thereafter allowed for lands within second-form withdrawals, and notwithstanding the said regulations of October 15, 1910, which preference right he is entitled to exercise upon the lands again becoming subject to entry; but contests heretofore dismissed under said regulations will not be reopened where third parties have acquired rights under such adjudications.

ADAMS, *First Assistant Secretary:*

The Department has considered motion for rehearing filed in the case of Fannie B. Long v. John O. Lee, wherein the Department, June 7, 1912, affirmed the decision of the Commissioner of the General Land Office, rejecting the protest filed by Long against that portion of Lee's entry, made May 15, 1911, embracing lands claimed by Long as successful contestant against a prior entry therefor canceled August 20, 1910, while said lands were embraced in a second-form withdrawal, under the act of June 17, 1902 (32 Stat., 388), which was later revoked and said lands thrown open to settlement April 13, and to entry May 15, 1911, when Lee made his said entry.

The Department in said decision concurred in the Commissioner's holding that said protest was properly rejected, under the circular of October 15, 1910 (39 L. D., 296), wherein it was held that the act approved June 25, 1910 (36 Stat., 835), *ipso facto* terminated all rights under contests pending at that date.

Since this motion was filed Lee has relinquished his entry as to the lands claimed by Long, but whether Long has been permitted to make entry of said lands does not appear. In view, however, of the contention urged in this motion that a preference right was lawfully acquired by Long herein prior to said circular, the case is reconsidered on its merits.

Long appears to have initiated, April 28, 1910, a proper contest, charging failure to establish residence, against said prior entry, which was relinquished August 20, 1910, after service of contest notice, and she was then notified of said withdrawal and of the provisions of said act of June 25, 1910, deferring entries of lands so withdrawn until public announcement of the establishment of farm units, water charges, and date for application of water to the land, and that upon such announcement she would have, after notice thereof, thirty days within which to exercise her preference right under said contest. No such announcement was made, but within thirty days after restoration of the lands to entry, Long applied as in exercise of said preference right, which was then denied her, however, under said circular of October 15, 1910, and she protested accordingly against Lee's entry.

Long's contest appears to have been initiated and a preference right, on relinquishment of the contested entry, August 20, 1910, accorded her at that time, properly in accordance with the regulations of January 19, 1909 (37 L. D., 365), and May 31, 1910 (38 L. D., 627), then in force, allowing such contests, and providing for preference rights based thereon; said act of June 25, 1910, being given effect as merely postponing the exercise of such rights until public announcement, as therein provided.

The Department is convinced that this action was strictly correct, and that Long thereby acquired a lawful preference right as to the lands involved, which is entitled to precedence over Lee's entry for said lands, notwithstanding the intervention of said circular of October 15, 1910, which was clearly too broad if literally applied, and was modified in the case of *Roberts v. Spencer* (40 L. D., 306), so as to allow dismissal of contests pending June 25, 1910, only in cases where the entryman is found to be within the class protected by the act also approved on that date (36 Stat., 864), authorizing the Secretary, in his discretion, to grant leave of absence in such cases where the entryman made entry in good faith and has substantial improvements thereon.

There is nothing in said first act of June 25, 1910, in derogation of existing contests or of a contest right, or tending to show any intention, by its limitation as to subsequent entries within second form withdrawals, to foreclose pending, or bar future, contests or to bar preference rights based upon such contests properly initiated under

existing law and regulations relative to contests and terminating in fact in cancellation of the contested entries. Giving that act its full force and effect, it merely postpones the exercise of such right, and the land department has no authority by regulation to disregard the law granting contests and preference rights or deny the right. *Beach v. Hanson* (40 L. D., 607). In this connection see recent regulations of August 24 and September 4, 1912 (41 L. D., 171, 241), amending the previous regulations bearing upon this subject.

Under these regulations, where an entry under contest embraces lands covered by a reclamation withdrawal and at the time of the successful termination of contest, resulting in the cancellation of the existing entry, the lands are not in a condition to be then entered under the law, the preference right of contestant is postponed in its enjoyment until the lands, by restoration or otherwise, become subject to further entry. Under the facts in the present case Long secured such a preference right, which was not defeated by the intervening entry of Lee. The motion is therefore sustained, the decision of June 17, 1912, vacated and set aside, and the case remanded for appropriate action in accordance with the foregoing. It is not meant hereby, however, to reopen contests heretofore dismissed under the said circular of October 15, 1910, and rights of third persons have been acquired under such adjudications.

WILLARD E. HUTCHINGS.

Decided October 12, 1912.

REPAYMENT—VOLUNTARY RELINQUISHMENT—SETTLEMENT CLAIM.

An entry voluntarily and in good faith relinquished because in conflict with a prior settlement claim of another protected by the act of May 14, 1880, is "canceled for conflict" within the meaning of the act of June 16, 1880, and the entryman is entitled to repayment of the moneys paid in connection therewith.

ADAMS, First Assistant Secretary:

February 15, 1912, the Commissioner of the General Land Office transmitted the above-entitled case to the Department for consideration.

It appears that on June 30, 1899, Willard E. Hutchings made original homestead entry at Salt Lake City, Utah, land office, for the SE. ¼, Sec. 14, T. 8 N., R. 18 W. On July 31, following, one C. C. Herrington filed a contest against said entry, alleging prior settlement and improvements made with the intention of entering the land under the homestead law. Notice was issued on the contest, but prior to the time set for the hearing Hutchings's relinquishment was

filed; whereupon his entry was canceled, and on September 5, following, Herrington made entry of the land. February 16, 1901, Hutchings's application for repayment of fees and commissions, on account of said entry, was favorably acted upon by this Department, but, on March 30, 1901, the Auditor disallowed the account and returned it for reconsideration, expressing it as his opinion that the entry had not been "erroneously allowed," nor had it been "canceled for conflict," but upon and after voluntary relinquishment to avoid a contest, and, in the opinion of his office, repayment was not authorized by the law. On further consideration the application for repayment was denied.

June 3, 1911, the attorney for Hutchings requested a revival of the claim in view of departmental decision in the case of Hulda Rosling (39 L. D., 477), and it is upon this request that the matter is now submitted for departmental consideration.

At the time of relinquishing his entry Hutchings signed the following statement upon the back of his duplicate homestead receipt:

My reason for making this relinquishment is that I found that upon visiting the land, after making the within entry, one C. C. Herrington and his family were residing upon the same, and had moved thereon the 8th day of May, 1899, with the intention of homesteading the same; and being advised that said Herrington's rights were superior to mine, both in law and equity, I hereby relinquish.

This statement was signed and filed August 25, 1899. Thereafter, on February 20, 1900, he executed an affidavit in support of an application to be allowed to make a second homestead entry, and in said affidavit he alleged that his first entry was made in good faith "without any knowledge of a later acquired settlement right of one C. C. Herrington, who, soon after affiant made his entry, asserted his right to said land as a settler thereon. . . . Affiant learned, after entry and after careful inquiry, that said Herrington was a *bona fide* settler, with valuable improvements, upon said land, having a comfortable house, in which he lives, together with plowed land, fencing, etc.," and in support of his application for repayment of the fees and commissions paid upon his first entry Hutchings executed an affidavit on January 31, 1900, in which he swears "that he examined said land, being the land embraced in his first entry, carefully prior to entry. . . . affiant being a poor man, without means to defend his right to said land, and believing in the priority of claim of said Herrington, was compelled to abandon his entry and give the said contestant, Herrington, a relinquishment of the entry."

It is true that under the homestead law (section 2289, Revised Statutes) only "unappropriated public lands" are subject to entry, and that by the third section of the act of May 14, 1880 (21 Stat., 140), a settler upon public lands is allowed the same time for filing

his homestead and perfecting his original entry as was then allowed settlers under the preemption laws to put their claims of record, with the right, upon the making of the entry, to have the homestead claim relate back to the date of settlement the same as if settlement had been initiated under the preemption laws: nevertheless, it has been the uniform holding of the Department and of the courts that a mere settlement on public lands, unaccompanied by an assertion of claim in the land department, does not appropriate the land from other settlement or entry. Indeed, under the preemption laws, which were based entirely upon a preceding settlement, it was not uncommon to have two or more preemption declaratory statements filed for a given tract of public land.

It can not, therefore, be held that the tract embraced in Hutchings's original homestead entry, was not subject thereto, even though it were known that another was at that time actually domiciled on the land but without formal assertion of claim through proceedings in the land department. Neither can it be held that Hutchings secured the allowance of his entry through any misrepresentation or false statement. Indeed, it is not inconsistent, upon this record, to find that Hutchings acted in entire good faith in the making of his first homestead entry and that his subsequent relinquishment thereof was induced by a showing upon the part of the contestant that led him to believe that such contestant had initiated a prior claim to the land, of which he had no knowledge, and which he might not defeat on contest, and which, in equity and good conscience, he should not defend against; for it clearly appears on the showing that he made his entry in good faith, after an examination of the land, and that after visiting it, upon making entry, he found Herrington and family domiciled thereon, and, on representations then made to him, he executed his relinquishment. If he believed that on the hearing of the matter his entry must be canceled because of the prior claim of another, it is the opinion of this Department that for the protection of his further rights in the premises it was not necessary that he should burden himself and the Department with the unnecessary expense of a protracted hearing in this matter; and that his entry, canceled under such circumstances, on relinquishment, is clearly a cancellation for conflict with the prior settlement claim of another protected by the act of May 14, 1880, and thus within that provision of the act of June 16, 1880 (21 Stat., 287), wherein repayment is allowed "in all cases where homestead or timber-culture, or desert-land entries or other entries of public lands, have heretofore or shall hereafter be canceled for conflict."

The Department is not prepared to say that a case of actual fraud might not be shown to exist with respect to the making of a homestead entry, for the purpose of illegally appropriating the known im-

provements of another, or for the purpose of holding up such prior claimant and forcing him to a settlement. There is nothing in this record, however, to justify any such suspicion, and, for the reason hereinbefore given, it is believed that the repayment should be allowed, as applied for, and you are directed to prepare, for my signature, a warrant on the Treasurer for said account, as directed by section 4 of the repayment act of 1880.

MAHON-ROBINSON LUMBER COMPANY.

Decided October 16, 1912.

FORT PECK INDIAN LANDS—TOWN LOT ENTRY—FOREIGN CORPORATION.

A foreign corporation authorized to do business within the State of Montana, and empowered by its charter and the laws of that State to hold real estate, and which has improved and is in possession of and conducting its business upon town lots within the townsite of Poplar, in that State, is qualified within the meaning of section 14 of the act of May 30, 1908, so far as the requirement of residence is concerned, to make entry of such lots under and in accordance with the provisions of that section.

ADAMS, *First Assistant Secretary*:

Appeal is filed by the Mahon-Robinson Lumber Company, by George F. Grogan, its secretary and general manager, from decision of November 20, 1911, of the Commissioner of the General Land Office holding for cancellation the cash entry made by said company March 18, 1911, through its said secretary and general manager, under section 14 of the act of May 30, 1908 (35 Stat., 563), relating to the sale of certain townsite lots, for lots 18, 19 and 20, block 19, in the townsite of Poplar, Montana, in the Glasgow, Montana, land district.

The Commissioner held said entry for cancellation for the stated reason that said company is a foreign corporation, as regards the State of Montana, and not a resident of said State within the law under which said entry is made.

This company is a corporation organized under the laws of the State of North Dakota, empowered by its charter to own, buy, sell or lease real estate, and was licensed February 7, 1910, by the superintendent of the Port Peck Indian Agency to conduct a lumber yard at said town of Poplar, such license expiring February 7, 1911, when it was renewed for one year. Its articles of incorporation are of record in the office of the Secretary of State for the State of Montana.

Since June, 1910, said company has occupied said lots 18, 19 and 20, erected thereon buildings stated to be permanent in character, and other improvements, valued at \$2,500, and has conducted thereon

a lumber business under the local management of George Morse, its licensed agent.

Said act, "An act for the survey and allotment of lands now embraced within the limits of the Fort Peck Indian Reservation, in the State of Montana, and the sale and disposal of all the surplus lands after allotment," provides in said section 14 for the survey and platting into town lots, streets, alleys and parks of the settlement of Poplar, and for the disposition of such townsite under section 2381, Revised Statutes, with the proviso—

That any person who, at the date when the appraisers commence their work upon the land, shall be an actual resident upon any one such lot and the owner of substantial and permanent improvements thereon, and who shall maintain his or her residence and improvements on such lot to the date of his or her application to enter, shall be entitled to enter, at any time prior to the day fixed for the public sale and at the appraised value thereof, such lot and any four additional lots of which he or she may also be in possession and upon which he or she may have substantial and permanent improvements.

These lands are not public lands of the United States, and are not governed generally, as to their disposition, by the public land laws, but only as and to the extent provided in said act. For this reason, the instructions, referred to in said decision of the Commissioner, approved by the Secretary (39 L. D., 80), as to the status within a state of a foreign corporation relative to its cutting timber on public lands, mineral in character, under the act of June 3, 1878 (20 Stat., 88), limiting said timber cutting to residents and citizens of the state, are not applicable to this case.

These lands are Indian lands, authorized and directed by said act to be sold, upon the conditions specified therein, by the United States as trustee for the Indians; and there is nothing in said act restricting such sales to residents or citizens of the State. It gives the preferential right of purchase of townsite lots to any one who may have in fact made substantial and permanent improvements on all thereof claimed, not exceeding five, and who resides upon one lot and actually possesses the others; the manifest object and intent of such provisions being to insure the immediate, permanent and proper improvement and occupancy of such lots for townsite purposes.

Foreign corporations are permitted by the State of Montana to do business in that State when duly authorized under its laws, and upon being so authorized to own real estate therein the same as domestic corporations (Revised Codes 1907, Section 4420), which are empowered to purchase, hold and convey such real estate as the purposes of the corporation may require (Section 3389).

Aside from the matter of a preference in purchasing townsite lots under this act, there is nothing in said act to preclude corporations, domestic or foreign, from purchasing such lots at any public sale

under said act the same as natural persons, except as limited by their charter and the laws of the State; and having such right to purchase such lots at such sale no reason appears why such corporations may not also have the preferential right of purchase given by said proviso of Sec. 14 of said act to those who, prior to appraisement, had substantially and permanently improved and possess one or more lots in said townsite. A foreign corporation which has thus improved and possesses such lots and actually conducts thereon its business in that State clearly has a residence on the lots so far as residence thereon is possible to a foreign corporation, and such residence comports with the objects and purposes of said act and is not excluded by anything in its terms or provisions. "Resident" is a word whose statutory meaning depends upon the context and the purposes of the statute wherein it is used, and the word as here used clearly comprehends the business occupancy of townsite lots by a foreign corporation authorized to do business within the State and empowered, by its charter and the laws of that State, to hold such real estate.

The decision appealed from is accordingly reversed.

CERTIFIED COPIES OF RECORDS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., October 17, 1912.

(1) By section 461, United States Revised Statutes, as amended and supplemented by the act of Congress approved August 24, 1912 (Public, No. 317), the Secretary of the Interior, the heads of the several bureaus, offices, and institutions, and other officers of the Interior Department are authorized to make and furnish to interested persons certified copies of any of the records in their said offices contained, said records not being confidential and privileged in character, upon payment of fees and charges specified by law.

(2) Certified copies of such records may be supplied to officers of the United States, requiring the same in their official capacities and for their official use, without the payment of any fee.

(3) The following schedule of fees is prescribed by law:

(a) For written copies, 15 cents for each 100 words.

(b) For photographic copies, 15 cents for each sheet.

(c) For photolithographic copies, 25 cents each.

(d) For tracings or blue prints, a sum equal to the cost of preparing the same.

(e) For certifying an authenticated copy and affixing thereto the seal of the officer certifying, 25 cents.

(f) For each certified copy of any printed order or regulation promulgated by the department or any of its bureaus or offices and intended for gratuitous distribution, 25 cents.

(4) The cost of a certified photographic copy of a patent will be ordinarily 40 cents. The cost of a typewritten copy will ordinarily be 85 cents. In any case where the amount remitted is not sufficient, the remitter will be promptly advised concerning the extent to which his remittance is deficient.

(5) A separate certificate and seal must be attached to each certified copy of a patent, as well as to each certified copy of any township plat: Provided, however, that where there have been two or more surveys of the same township, and a plat of each survey is desired, all of such related plats may be authenticated and certified by one certificate and one impression of the official seal.

(6) All fees for certified copies must be prepaid, no authority to grant credit for the cost thereof being possessed by any officer authorized to make same.

(7) Remittances may be effected by means of New York exchange, certified check, cashier's check, or post-office money order.

(8) Section 4 of the act approved August 24, 1912, *supra*, requires all officers who supply authenticated copies of official records to attest their authentication by the use of an official seal. In any case where registers and receivers or surveyors general are not provided with such a seal they should immediately advise the Commissioner of the General Land Office of that fact, to the end that the necessary equipment may be secured and supplied to them. They should, at the same time, advise that official concerning the extent to which certified copies have been supplied by them to persons demanding the same during the three fiscal years next preceding, as nearly as the fact can be ascertained and stated.

(9) Inasmuch as the legislation referred to in the last preceding paragraph requires and directs that all moneys received for certified copies shall be deposited in the Treasury of the United States to the credit of the fund known as "Miscellaneous receipts," surveyors general will not be authorized, in the preparation of certified copies, to employ the services of an employee whose compensation is paid from the fund "Deposits by individuals for surveying public lands."

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

[PUBLIC—No. 317.]

AN ACT To make uniform charges for furnishing copies of records of the Department of the Interior and of its several bureaus.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior, the head of any bureau, office, or institution, or any officer of that department, may, when not prejudicial to the interests of the Government, furnish authenticated or unauthenticated copies of any official books, records, papers, documents, maps, plats, or diagrams within his custody, and charge therefor the following fees: For all written copies, at the rate of fifteen cents for each hundred words therein; for each photolithographic copy, twenty-five cents where such copies are authorized by law: for photographic copies, fifteen cents for each sheet; and for tracings or blue prints the cost of the production thereof to be determined by the officer furnishing such copies, and in addition to these fees the sum of twenty-five cents shall be charged for each certificate of verification and the seal attached to authenticated copies: *Provided*, That there shall be no charge for the making or verification of copies required for official use by the officers of any branch of the Government: *Provided further*, That only a charge of twenty-five cents shall be made for furnishing authenticated copies of any rules, regulations, or instructions printed by the Government for gratuitous distribution.

SEC. 2. That nothing in this act shall be construed to limit or restrict in any manner the authority of the Secretary of the Interior to prescribe such rules and regulations as he may deem proper governing the inspection of the records of said department and its various bureaus by the general public, and any person having any particular interest in any of such records may be permitted to take copies of such records under such rules and regulations as may be prescribed by the Secretary of the Interior.

SEC. 3. That all authenticated copies furnished under this act shall be admitted in evidence equally with the originals thereof.

SEC. 4. That all officers who furnish authenticated copies under this act shall attest their authentication by the use of an official seal, which is hereby authorized for that purpose.

SEC. 5. That the act of Congress approved April nineteenth, nineteen hundred and four, chapter thirteen hundred and ninety-six, be, and the same is hereby, repealed: but nothing in this act shall be so construed as to repeal the provisions of sections four hundred and ninety to four hundred and ninety-three, inclusive, and forty-nine hundred and thirty-four of the Revised Statutes, fixing the rates for patent fees; or the act approved March third, eighteen hundred and ninety-one, chapter five hundred and forty-one, fixing a rate for certifying printed copies of specifications and drawings of patents; or of section fourteen of the act of February twentieth, nineteen hundred and five, chapter five hundred and ninety-two, to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same; nor shall anything in this act be construed to repeal any of the provisions of section eight of the act approved April twenty-sixth, nineteen hundred and six, chapter eighteen hundred and seventy-six, authorizing the officer having charge of the custody of any records pertaining to the enrollment of members of the Five Civilized Tribes of Indians to furnish certified copies of such records and charge for that service such fees as the Secretary of the Interior may prescribe; nor shall anything herein contained prevent the Secretary of the Interior, under his general power of supervision over Indian affairs, from prescribing such charges or fees for furnishing certi-

fied copies of the records of any Indian agency or Indian school as he may deem proper; and the said Secretary is hereby authorized to charge a fee of twenty-five cents for each certified copy issued by him as to the official character of any officer of his department.

SEC. 6. That all sums received under the provisions of this act shall be deposited in the Treasury to the credit of miscellaneous receipts.

Approved, August 24, 1912.

WILLIAM H. ARCHER.

Decided October 17, 1912.

SECOND HOMESTEAD—ABANDONMENT—SALE OF IMPROVEMENTS.

Where a homestead entry has been absolutely abandoned, and is subject to cancellation on contest or governmental proceedings on that ground, the former entryman, by thereafter relinquishing the entry and selling the movable improvements thereon at less than cost and well within their reasonable value, does not disqualify himself to make second homestead entry under the provisions of the act of February 3, 1911.

ADAMS, *First Assistant Secretary*:

William H. Archer appealed from decision of the General Land Office of December 27, 1911, denying his application for second homestead entry for NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, T. 2 S., R. 27 W., 5th P. M., Camden, Arkansas.

In January, 1908, Archer made his first entry for SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, same section, which he relinquished April, 1911. By his corroborated affidavit for second entry, September 15, 1911, he showed that in January, 1908, he bought lumber and built a house on his claim, established residence and lived therein for a time, but, on account of sickness and death in his family and other causes, he abandoned the entry, and, April, 1911, he relinquished the entry to one William Moosdorf, who paid him a consideration of \$20 for the lumber and labor on the house. That it was not canceled for fraud.

The Commissioner found that as the filing fee on Archer's entry was but seven dollars, he was on his own statement disqualified by act of February 3, 1911 (36 Stat., 893), from making a second entry, for the act provided its benefits should not extend to any person "who relinquished his former entry for a valuable consideration in excess of the filing fees paid by him on his original entry." The application was denied.

Archer shows by affidavit that he had abandoned his former entry two years before he knew Moosdorf, and that the \$20 paid by Moosdorf was to enable him to partly pay for the lumber used in the house for which he still owed; that he applied the money on that debt and has since paid the mill owner the balance of debt for the lumber used in the house sold by him to Moosdorf; that he relinquished his former

entry to the United States, and in fact received nothing for relinquishing the entry.

The act of February 3, 1911 (36 Stat., 896), permits:

That any person who, prior to the approval of this act, has made entry under the homestead or desert-land laws, but who, subsequently to such entry, from any cause shall have lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead or desert-land laws as though such former entry had not been made, and any person applying for a second homestead or desert-land entry under this act shall furnish a description and the date of his former entry: *Provided*, That the provisions of this act shall not apply to any person whose former entry was canceled for fraud, or who relinquished his former entry for a valuable consideration in excess of the filing fees paid by him on his original entry.

Under this statute the conditions—"lost, forfeited, or abandoned"—are separate and distinct. An entry may be lost or abandoned without a forfeiture, notation of record, or official ascertainment of such fact. If there was in fact a complete abandonment, the condition precedent to a second entry was complete and the entry was subject to cancellation if attacked by a contestant or by the Government. This condition existed for two years before the application for second entry.

The fact of abandonment of a former entry gives benefit of statute, whether the former entry is formally canceled on the record or not. *Walton v. Monahan*, 29 L. D., 108; *Liberty v. Moyer*, 38 L. D., 381; *Turney v. Manthey*, 32 L. D., 561; *Lean v. Kendig*, 36 L. D., 221.

The Department therefore holds that after complete abandonment of an entry, subjecting it to cancellation on contest or governmental proceedings, the former entryman does not forfeit benefits of the act of February 3, 1911, *supra*, simply by sale of such of his improvements as are in fact movable, at a sum less than cost and well within their reasonable value. The decision is therefore reversed. If no other objection appears, Archer's application will be allowed.

ANDERSON COAL COMPANY.

Decided October 21, 1912.

COAL ENTRY—CORPORATION—QUALIFICATIONS.

The fact that a coal entry by an individual was made for the benefit of a corporation does not affect the validity of the entry, provided the corporation and each of the persons in whose interest the entry was directly or indirectly made possess the requisite qualifications to make entry under the coal land laws.

SECOND COAL FILING.

A second coal filing by the same person may properly be allowed where sufficient reason is shown for failure to perfect title to the tract embraced in the first filing.

ADAMS, *First Assistant Secretary*:

The Anderson Coal Company has appealed from the Commissioner's decision of March 4, 1911, holding for cancellation coal entry 01159, allowed in its name, as an association, for the SE. $\frac{1}{4}$, SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 28, and the NW. $\frac{1}{4}$, Sec. 33, T. 53 N., R. 75 W., 6th P. M., Buffalo land district, Wyoming.

The tracts above described were, it appears, withdrawn by departmental order of October 15, 1906, as later modified, from disposition under the provisions of the coal land laws and on June 10, 1907, were classified as coal lands and ordered to be disposed of at the price of \$20 per acre.

By order of April 3, 1909, the local officers were instructed to erase said valuation of the lands in the above described township and to treat said township as "withdrawn but not classified." By the Commissioner's letter of August 12, 1909, the tracts hereinabove described were again classified as coal lands and appraised at the following prices per acre: NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 28, \$100; SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 28, \$105; NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 28, \$120; SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$, Sec. 28, and NW. $\frac{1}{4}$, Sec. 33, \$125.

The said entry was allowed July 21, 1909, between the dates of the last withdrawal and the reappraisal of the land at the higher prices. The application to make said entry was filed May 13, 1909, was signed and sworn to by John Anderson, J. Emerson Dodds, Ed F. Rose and William D. Crone, who therein described themselves as "an association known as the Anderson Coal Company," and recited an expenditure upon the land, in labor and improvements, of the sum of \$9,500, "the nature of the improvements being as follows: grading mine, track, built tipples, boarding house, bunk house, ties, steel rails, mine cars and other equipment, opening mine by tunnel." The application, however, had been preceded by a declaratory statement filed January 8, 1909, and signed and sworn to by the above mentioned parties, which contains the following recitals:

That said parties desire to enter the above described land as an association of men incorporated under the name of Anderson Coal Company, which corporation was incorporated and a certificate of incorporation filed in the office of the Secretary of the State of Maine on the thirtieth day of December, A. D. 1908; that the above named John Anderson, J. Emerson Dodds, William D. Crone and Ed. F. Rose are directors in said corporation and are the only parties in interest in said corporation and have paid and will pay the money for the development of said lands and for the payment to the United States therefor; that there are other nominal parties connected with said corporation who have acted as trustees of the above named parties for the purpose of effecting an organization in the State of Maine, but who have no actual and substantial interest in said corporation; that said corporation, the Anderson Coal Company, entered into possession of the above described tract of land, and have remained in actual possession continuously since, said thirtieth day of December, 1908, during which period it has diligently prosecuted work for the development of coal; that

on the last named date said corporation continued work of development upon a valuable mine of coal upon said lands, which it has continued to improve as such since said date; that said mine had been opened before said date and that said corporation has now in its employ, as servants and agents, upon such labor and improvements ten men; that in such labor and improvements said corporation has expended the sum of about five thousand dollars (\$5,000), the labor and improvements being as follows: at the time of organization of said corporation a mine had been opened on the southwest quarter of section twenty-eight and other openings had been made upon each of the other subdivisions of said land. The said mine on the southwest quarter of section twenty-eight had been opened upon the slope for a distance of about 80 feet in depth. Improvements had been made consisting of a boarding house and other buildings, of grading, and about fifteen hundred dollars (\$1,500) has been expended for lumber for tipples and other buildings and said lumber is now upon said land. Said improvements and development work were paid for by said corporation and are now the property of said corporation, and the development of said mine is being continued by said corporation.

It further appears that on May 7, 1908, and previously to the filing of the above-mentioned coal declaratory statement, the following persons had filed coal declaratory statements for the land here in question, viz., Margaret T. Barr for the NW. $\frac{1}{4}$, Sec. 33, Lila L. Barr for the SW. $\frac{1}{4}$, Sec. 28, Allen L. Clark for the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 28, and Frederick W. Clarke for the SE. $\frac{1}{4}$, Sec. 28. Relinquishments of said four declaratory statements were executed by said parties December 15 and 16, 1908, and accompanied the declaratory statement of Anderson *et al.*, which was filed January 8, 1909.

In connection with an investigation of the entry here in question by a special agent of the General Land Office, the coal claimants submitted an affidavit, executed March 31, 1910, by J. Emerson Dodds, one of the applicants, who describes himself as superintendent of the Anderson Coal Company. Referring to the lands embraced in the entry, he avers that:

These lands had previously been filed upon by parties connected with the Coal Gulch Coal Company and we purchased the relinquishments to said lands of said company, such purchase having been made in the name of J. E. Dodds and associates, parties of the first part, and Pressley J. Barr and associates, party of the second part. A true copy of this agreement is marked exhibit "A" and made a part of this affidavit.

The agreement filed as an exhibit in connection with said affidavit reads as follows:

This preliminary agreement made this 7th day of December, 1908, by and between J. Emerson Dodds and associates, parties of the first part, and Pressley Barr and associates, parties of the second part, witnesseth,

That whereas, the said Pressley Barr and associates, have entered certain tracts of coal land known as the Echeta or Coal Gulch property, in Wyoming, United States of America;

And whereas, the said J. E. Dodds and associates are desirous of entering said land:

Now therefore, the said Pressley Barr and associates hereby agree to relinquish and give up any interest they may have in said lands so as to allow the same to be open to entry. The said J. E. Dodds and associates on their part agree to raise the sum of \$12,500 and expend the same as follows:

First, they shall pay to the said Leslie Barr and Pressley Barr the sum of \$2500, which the said Barrs agree to use in cleaning up all the debts pertaining to the aforesaid mining properties now existing, except the lumber bill for lumber on the ground which was purchased of Proudfit & Pally L. Co. of Lincoln, Nebraska, which lumber will be taken and paid for by J. E. Dodds and associates. The remaining portion of the said \$12,500, to-wit, \$10,000, shall be used in developing the mine on the aforesaid property and ascertaining whether the coal is valuable and profitable to work. If, at the end of such developing period and before July, 1909, the said J. E. Dodds and associates shall determine that said mine is profitable and worth working, they shall provide such sum of money as shall be necessary to obtain title from the United States, and form a company which shall enter said lands according to law, and to which company the title to said property shall be conveyed, said company to have a capital of one million dollars of stock, fully paid up and shall give to Pressley Barr and associates \$499,000 of the stock of the said company; they shall loan to said company the money necessary to purchase said land from the United States at the rate of six per cent interest and shall agree to accept as pay for said money so advanced to purchase said land from the United States, one-half of the profits of the mine, until the same is fully paid up.

It is understood that R. S. Hall is to be attorney and counsellor of said mining company when formed, with an annual retainer of \$300 per year or some other sum, as shall be agreed upon. The \$499,000 of stock herein mentioned shall be deposited in the hands of R. S. Hall to be by him properly apportioned among Pressley Barr and his associates.

This agreement bears date December 7, 1908.

It appearing from the affidavit of Dodds and the copy of the agreement filed in connection therewith that Pressley J. Barr and Lester Barr were to be beneficiaries, in part, under said entry, the Commisisoner, by decision of July 7, 1910, held the entry to be illegal and required the claimants to show cause why it should not, for that reason, be canceled. Showing was duly made by the claimants, but the Commissioner, in the decision here appealed from, found and held the same to be insufficient.

From a showing made by the company in response to the requirements of the Commissioner's decision of July 7, 1910, it appears that on June 10, 1902, Pressley J. Barr filed coal declaratory statement for the NE. $\frac{1}{4}$, Sec. 13, T. 51 N., R. 75 W., Buffalo land district, which was canceled by the Commissioner December 24, 1903, for failure to make proof and payment for the land. The reasons given by Barr for his failure to perfect this claim are that, after making the filing, he was informed by the division general manager of the Chicago, Burlington & Quincy Railroad Company, to which railroad the land is tributary, that the company was hostile to any proposition looking to the opening of any more coal mines in the

vicinity of Sheridan, Wyoming; that there were already in that vicinity a sufficient number of mines to supply the demand for coal, and that the opening of any more mines there would entail additional and unnecessary expense to the railroad, and that he did not intend to give Barr any facilities whatsoever in the way of track-age or railroad connections, or cars for handling coal; Barr further states that it was necessary to the successful operation of the mine on the land that the railroad company should permit a spur track leading from the land to be constructed and connected with the main line of its railroad, and also furnish an adequate number of cars from time to time for the shipment of such coal as might be mined; that he knew, without the friendly cooperation of the railroad, it would be impossible for him to operate a mine or secure the necessary capital with which to equip one; that he did not have a sufficient amount of money himself with which to equip a mine and could not induce others to supply the necessary capital because both the general manager of the division and the president of the railroad company would have discouraged such persons from investing by telling them that the company did not desire a coal mine operated at that place; that, while he did all he could to interest persons in advancing money for the equipment of a mine on that land, he was always asked whether the railroad company was friendly to the project, and was in each case compelled to tell them that it was not, whereupon negotiations were dropped.

Respecting the particular area here in question, Barr states that Margaret T. Barr, who made the filing on the said NW. $\frac{1}{4}$ of Sec. 33, is his daughter; that, after she had made said filing, he learned that he could get stock in the Anderson Coal Company if he could secure the relinquishments of the filings then upon the tracts embraced in the present entry; that he made this fact known to his daughter and she, on account of the benefit that would accrue to him, relinquished the filing without other consideration; that at the time Margaret T. and Lila L. Barr, and Allen L. and Frederick W. Clarke filed upon the land they leased the same to Barr, who afterward assigned all of the leases to the Coal Gulch Coal Company of which said Barr was president and Lila L. Barr and Allen L. Clark directors; that, under the terms of said leases, the Coal Gulch Coal Company expended in developing a coal mine upon the leased lands the sum of about \$5,000, and that it was on account of said improvements and in payment therefor and of the securing of the relinquishments from the declarants that the stock of the Anderson Coal Company was agreed to be delivered to himself and associates.

Lester J. Barr, brother of the aforesaid Pressley J. Barr and one of his associates in the agreement with Dodds *et al.*, states, under

oath, that on June 10, 1902, he filed coal declaratory statement for the SE. $\frac{1}{4}$, Sec. 13, T. 51 N., R. 75 W., Buffalo, Wyoming, but failed to complete the same for substantially the same reasons as those given by Pressley J. Barr for failing to perfect his claim. He further states that Lila L. Barr, who filed coal declaratory statement for the SW. $\frac{1}{4}$, Sec. 28 aforesaid, which is part of the land here in question, is his wife and that, being afforded an opportunity to secure stock in the Anderson Coal Company upon the relinquishment of the declaratory statement covering the land embraced in the present entry, they deemed it more to their advantage that he should possess said stock than that she should retain the land and attempt to operate it; that she was to have no interest whatsoever in the Anderson Coal Company.

Allen L. Clark, another of Pressley J. Barr's associates, states, under oath, that he is the person who filed declaratory statement for the said SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 28, embraced in the present entry, and is interested in and entitled to receive a portion of the stock of the Anderson Coal Company assigned or to be assigned to Barr and his associates; that his reason for relinquishing his said filing was that he knew he could be more successful in the development and operation of a coal mine upon the land in cooperation with the Anderson Coal Company than alone; that he had experienced difficulties with the Burlington Railroad Company and had been informed by the officials thereof that he would not be allowed to operate a mine upon the land or get railroad facilities for the shipment of coal, and that he therefore concluded it was best to merge his interests in the individual quarter upon which he had filed in the Anderson Coal Company which was subsequently able to secure railroad facilities; that he could not successfully proceed to the development of a mine of coal upon the land unless he had the cooperation of the railroad company, and that he had no reason to believe that he could obtain this because he had been informed by the officials of the railroad company that it would not so cooperate.

Aside from said filings, none of the persons above named had held land under the coal land laws.

The fourth member of the said Barr association was Richard S. Hall. He, it appears, died in August, 1910, but it is averred that he never, during his lifetime, filed a coal declaratory statement or entered any coal land under the laws of the United States. All of the persons who are, or are to be, interested in the Anderson Coal Company, for whose benefit the entry here in question was made, are shown to be citizens of the United States.

It is averred by said J. E. Dodds and others that the reason all of the above named parties were not joined in the affidavit of the coal declaratory statement filed January 8, 1908, was that they were

advised by attorneys that it would be improper to join said Pressley J. and Lester J. Barr, Allen L. Clark and Richard S. Hall because they had no present interest in the corporation or in the land but were to have merely a future contingent interest in the corporation. In view of the holding of the Commissioner, however, they asked that the declaratory statement and the application be amended so as to include the names of the said Pressley J. Barr and his associates.

It thus appears that the declaratory statement and the application upon which the entry in question was allowed, although signed and sworn to by Dodds, Anderson, Crone, and Rose as individuals comprising the Anderson Coal Company, an association, were nevertheless filed in the interest and for the benefit of the then recently organized Anderson Coal Company, a corporation, in the distribution of the capital stock of which Pressley J. Barr, Lester J. Barr, Allen L. Clark and Richard S. Hall, now deceased, were to share. Indirectly therefore a preference right was sought to be acquired and maintained and an entry made for the benefit of the Anderson Coal Company, a corporation, in the ultimate distribution of the capital stock of which the four persons last mentioned were to share. This fact, however, would not affect the validity of the entry, provided the corporation and each of the persons in whose interest the entry was directly or indirectly made possessed the requisite qualifications. *Colorado Anthracite Company* (225 U. S., 219).

It is nowhere suggested that the corporation known as the Anderson Coal Company, as such, had exhausted its right to make entry of coal land, and the only persons, directly or indirectly, presently or prospectively, interested therein, whose qualifications would seem to be open to question, are the aforesaid Lester J. Barr, Pressley J. Barr, and Allen L. Clark. None of these three persons has ever made a coal entry and hence their qualifications would be affected, if at all, only by the fact that, previously to the filing of the declaratory statement upon which the present entry is based, each had filed a coal declaratory statement which he failed to perfect. While there is no specific provision in the coal land laws that prohibits the securing of more than one preference right of entry or the filing of more than one coal declaratory statement, it is nevertheless provided in paragraph 5 of the regulations issued under and pursuant to the provisions of the coal land laws (35 L. D., 665, 667), that the right to enter or hold lands under such laws is exhausted by the previous acquisition of a preference right of entry "unless sufficient cause for the abandonment thereof is shown." This regulation would imply, however, that a second coal filing by the same person may properly be made where sufficient reason is shown for the failure of such person to perfect title to the tract embraced in his first filing. *Ex parte Henry Burrell* (29 L. D., 328). Upon careful

consideration of the above recited showing made by Clark and the Barrs, as to the reasons for their failure to perfect title to the land embraced in the individual coal filings, the Department is of opinion that the same is sufficient to warrant each being permitted to make or be the beneficiary of a second filing. It is therefore held that they were, at the date of the initiation of the claim now being asserted to the tract, each qualified to acquire a preference right to land under the coal land laws and to make entry thereof. They being thus qualified and there being no question as to the qualifications of the Anderson Coal Company, or any other person or persons interested therein at the dates of the initiation of the claim to this land and the entry thereof, there would seem to be no reason, under the decision in Colorado Anthracite Coal Company, *supra*, why, if the declaratory filing and entry were in other respects regular, the entry should not be permitted to stand.

In the concluding portion of the Commissioner's decision here appealed from he says:

The record has been carefully considered as to the opening and improving of a coal mine upon the 640-acre tract and as to what rights the Anderson Coal Company acquired thereunder, and upon the record it can not be held that the company had such rights, either on January 8, 1900, when the declaratory statement was filed or on April 3, 1909, when the coal classification at the minimum price was erased, as would entitle it to file a declaratory statement under the proviso to section 2348, R. S., or such as in any event would relieve it from final payment for the land at the rate per acre according to the reclassification made August 12, 1909. (See case of Carthage Fuel Co., decided by the Department January 10, 1911.)

The basis of this determination by the Commissioner is not entirely clear, but it is assumed that he intended to apply to this case the rule announced by him in his decision of December 3, 1910, rendered in the case of Carthage Fuel Company (the judgment of the Commissioner wherein was affirmed by departmental decision of January 10, 1911), which rule was to the effect that an expenditure of \$5,000 by an association of four or more persons in the working and improving of a mine of coal on a particular 640-acre tract is essential to the acquisition of a preference right to enter such tract under the coal land laws. The Department, however, by decision of May 21, 1912 (41 L. D., 21), recalled its said decision of January 10, 1911, reversed the Commissioner's decision of December 3, 1910, and held that the \$5,000 expenditure, referred to in the proviso to section 2348, is a condition precedent to the right to enter, and not the acquirement of a preference right to a 640-acre tract.

The decision appealed from is, for the reasons above stated, hereby reversed and the case is remanded for further and appropriate action in harmony with the views herein expressed.

WITHDRAWN LANDS—MINERAL EXPLORATION—ACT OF AUGUST 24, 1912.**CIRCULAR.**

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, October 21, 1912.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Your attention is called to the act of Congress approved August 24, 1912 (Public, No. 316), amending section 2 of the act of Congress approved June 25, 1910 (36 Stat., 847), copy of which is herewith attached.

You will note that the provision of the said act of June 25, 1910, that all lands withdrawn under the provisions of that act shall, at all times, be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, "so far as the same apply to minerals other than coal, oil, gas and phosphates," is changed by the amendment, so as to provide that such lands shall, at all times, be open to exploration, discovery, occupation and purchase under the mining laws of the United States, "so far as the same apply to metalliferous minerals." By the approval, on August 24, 1912, of the said act, all outstanding orders of withdrawal under the act of June 25, 1910, were modified to conform to the act approved June 25, 1910, as amended by the act of August 24, 1912: and, upon the approval of said last named act, the lands embraced in such orders of withdrawal ceased to be and are not open to exploration, discovery, occupation, or purchase under the mining laws of the United States, except for metalliferous minerals.

These instructions are in addition and supplementary to instructions of March 6, 1911 (39 L. D., 544).

You will exercise care in the enforcement of this important modification of the withdrawal orders.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

[PUBLIC—No. 316.]

AN ACT To amend section two of an Act to authorize the President of the United States to make withdrawals of public lands in certain cases, approved June twenty-fifth, nineteen hundred and ten.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two of the Act of Congress

approved June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and forty-seven), be, and the same hereby is, amended to read as follows:

"SEC. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: *Provided further*, That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June twenty-fifth, nineteen hundred and ten: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law: but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress."

Approved, August 24, 1912.

CREDIT FOR PRIOR PAYMENT UPON SECOND PROOF.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, October 24, 1912.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: The instructions under the act of March 26, 1908, contained in General Land Office circular dated July 23, 1910 (39 L. D., 146), under the heading "CREDIT FOR PRIOR PAYMENT IN SECOND APPLICATION TO COMMUTE," are hereby amended to read as follows:

CREDIT FOR PRIOR PAYMENT UPON SECOND PROOF.

In cases where the commutation homestead proof, final homestead proof, final desert-land proof, or other proof based upon an original entry, upon which you have issued certificate, has been rejected by this office, the certificate canceled, and the original entry allowed to stand subject to future compliance with the law, if second proof is

accepted, credit may be allowed for the money paid on the first proof, and the register will issue his certificate, bearing proper number and date, making notation thereon in accordance with paragraph 195, circular No. 105, dated May 4, 1912.

The entryman is required to pay the testimony fees in connection with the second proof, irrespective of the fees paid with the first proof, which fees are to be accounted for in accordance with instructions contained in said circular No. 105.

If the entire entry is canceled and the entryman is allowed to begin proceedings *de novo*, as for instance, in a mineral entry, the purchase money paid upon the first entry can not be applied in payment for a second entry. The only relief that may be afforded, if any, will be upon application for repayment.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

PLACER MINING CLAIMS IN ALASKA.

DEPARTMENT OF THE INTERIOR,
Washington, October 29, 1912.

UNITED STATES SURVEYOR GENERAL
AND REGISTERS AND RECEIVERS,
*United States Land Offices,
District of Alaska.*

GENTLEMEN: Your attention is directed to the act of Congress approved August 1, 1912 (Public, No. 250), entitled "An act to modify and amend the mining laws in their application to the Territory of Alaska, and for other purposes," a copy of which appears below.

It is important to note that this act applies exclusively to placer mining claims located in Alaska on or after August 1, 1912. It does not in any manner relate to lode mining claims, or to placer mining claims located prior to said date. The terms of the act lay strict limitations and conditions with respect to placer locations made upon or after said date.

Section one of the act provides that no association placer claim shall be located after August 1, 1912, in excess of 40 acres. This limitation is positive whatever may be the number of persons associated together or whatever the local district rules or regulations may permit.

Said section further provides that on every placer mining claim located in Alaska after the passage of the act, and until patent there-

for has been issued, not less than one hundred dollars' worth of labor must be performed or improvements made during each year, including the year of location, for each and every 20 acres or excess fraction thereof included in the claim. This means that the *first* annual expenditure on such a placer mining location must be accomplished for and during the calendar year in which the claim is located, instead of during the calendar year succeeding that in which the location is made. Moreover, the amount of annual expenditure is dependent upon the size of the claim, it being required that at least one hundred dollars must be expended for each 20 acres, or excess fraction thereof, embraced in the location.

By section two it is provided that no person, as attorney or agent for another, may locate any placer mining claim unless duly authorized by a power of attorney properly acknowledged and recorded in some recorder's office within the judicial division where the location is made. Furthermore, an authorized agent or attorney can act in making locations of placer mining claims for only two individual principals or one associate principal during any calendar month and during that period may not lawfully locate more than two claims for any one principal either individual or association. No placer claim can lawfully be located except in compliance with and under the limitations of the act.

In order that the land department may be fully advised in the premises, the following requirements must be met with regard to applications for placer mining claims located in Alaska on or after August 1, 1912:

a. Where location is made by agent or attorney the power of attorney must be in writing and must be executed and acknowledged in accordance with the laws of the Territory of Alaska or of the State, Territory, or District in which it shall be executed. It must be recorded in the proper recorder's office as prescribed by the act. The application for patent must be accompanied by a certified copy of such power of attorney which must show the recordation thereof, but it will be sufficient if such certified copy is attached to and made a part of the abstract of title.

b. One of the principal purposes of the act is to limit the number of placer mining locations made in Alaska through agents or attorneys. An agent or attorney can not at one time represent more than *two individuals* or *one association* under powers of attorney. A duly authorized agent may make two locations for each of two individual principals, or for one association principal, during any calendar month but he can make no further locations during that month for those or other principals.

The application for patent should accordingly be accompanied by the sworn statement of the agent or attorney setting forth specifically

the names of all placer mining claims, together with the date of location and names of the locators, which were located or attempted to be located by him under powers of attorney during the calendar month in which the placer claim applied for was located.

c. By section three it is prescribed that no person shall directly locate, or through an agent or attorney cause or procure to be located, for himself more than two placer mining claims in any calendar month, provided, however, that one or both of such locations may be included in an association claim.

Whenever a person or an association has participated in the locating of placer mining claims in Alaska to the extent of two such claims in any calendar month, such person or such association thereby exhausts the right to make placer location for that month. The application for patent, therefore, for a placer mining claim located in Alaska on or after August 1, 1912, must contain or be accompanied by a specific statement, under oath, as to each locator who had an interest therein showing specifically and in detail all placer locations made by him, or in which he was associated, either directly or through any agent or attorney, during the calendar month in which the claim applied for was located. If no locations in excess of those permitted by law were made during such calendar month a specific statement, under oath, to that effect, should be submitted. This showing must be made in addition to that hereinabove required of the agent himself.

Section four of the act prohibits the patenting of any placer mining claim located in Alaska after the passage of the act, which contains a greater area than that fixed by law or which is longer than three times its greatest width. The surveyor-general will be careful to observe the above requirements and will not approve any survey of a placer location which does not in area and dimensions conform to the provisions of law.

By section five of the act it is declared that any placer mining claim attempted to be located in violation of the provisions and limitations of the act shall be null and void and the whole area covered by such attempted location may be located by any qualified person the same as if no such prior attempted location had been made. Consequently, any attempted placer location not made in conformity with the act is a nullity and the land covered thereby is open for and subject to proper location at any time.

It will be observed that the act does not affect the number of claims, lode or placer, and if placer whether located before or after the passage of the act, which may be included in a single application proceeding.

SAMUEL ADAMS,
First Assistant Secretary.

[PUBLIC—No. 250.]

AN ACT To modify and amend the mining laws in their application to the Territory of Alaska, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no association placer-mining claim shall hereafter be located in Alaska in excess of forty acres, and on every placer-mining claim hereafter located in Alaska, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, including the year of location, for each and every twenty acres or excess fraction thereof.

SEC. 2. That no person shall hereafter locate any placer-mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer-mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer-mining claims for any one principal or association during any calendar month, and no placer-mining claim shall hereafter be located in Alaska except under the limitations of this act.

SEC. 3. That no person shall hereafter locate, cause or procure to be located, for himself more than two placer-mining claims in any calendar month: *Provided*, That one or both of such locations may be included in an association claim.

SEC. 4. That no placer-mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width.

SEC. 5. That any placer-mining claim attempted to be located in violation of this act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made.

Approved, August 1, 1912.

ALFRED D. HAWK.

Decided October 30, 1912.

REPAYMENT—ACT OF MARCH 26, 1908.

While the repayment act of March 26, 1908, is supplemental to the act of June 16, 1880, it nevertheless affords relief in certain cases coming within its provisions where repayment could not be allowed under the earlier act.

REPAYMENT OF PURCHASE MONEY—MINING CLAIM.

The purchase money paid in connection with a mineral entry, made in good faith but canceled for lack of sufficient proof of discovery, may be repaid under the provisions of the act of March 26, 1908.

ADAMS, *First Assistant Secretary*:

Alfred D. Hawk has appealed from the decision of the Commissioner of the General Land Office dated March 4, 1912, denying repayment upon mineral entry. Santa Fe 01071, of the Bitter Creek Placer, Santa Fe, New Mexico. The entry is situated in unsurveyed township 39 N., range 14 E. There were several claimants or loca-

tors of the claim. All have assigned rights to Hawk and all including Hawk have relinquished claims to the United States.

It appears that an adverse report was made against the entry by a forest officer charging that claimants did not expend \$500 on the land in labor and improvements and that the land is more valuable for the timber thereon and for townsite purposes than as a mineral claim, and that entry was made in order to get control of water power and for townsite purposes, and that no discovery of mineral had been made.

Hearing was duly had at which both parties were present. The register and receiver, March 29, 1909, held that defendants had expended \$1,300 on the claim in assessment work; that the record did not show that the claim was located for any other purpose than as a mineral claim; that there had been no discovery of mineral and that the only value of the lands was for the small amount of merchantable timber thereon and as a forest cover. The local officers recommended cancellation. Claimants did not appeal and the Commissioner, April 1, 1910, reviewed the record in the case holding that no gold or other minerals of value had been taken out of the land and no minerals found save some light colors of fine gold; that the timber on the land has little value and it was shown that the land had no value for townsite or water power purposes; that its chief value is as a "forest cover." The evidence showing that no minerals had been discovered on the claim and that evidences of minerals were not such as to warrant further expenditure of time and money, and no appeal being filed, the Commissioner canceled the entry.

Thereafter Hawk, as assignee of the rights of his co-claimants, applied for return of the purchase money. His application was rejected on the ground that there was no conflict to prevent consummation of the entry and that the entry was not erroneously allowed. Repayment was denied on the ground that the act of June 16, 1880 (21 Stat., 287), quoted by Commissioner did not authorize or justify the repayment applied for.

From that action claimant appealed.

Mineral claimants after location applied for survey of the claim. The same was surveyed October 12 and 13, 1906, by Deputy Mineral Surveyor Preston, who, among other things, reported:

The soil embraced in this claim consists of disintegrated mineral bearing porphyries on the mountain slopes and auriferous sand and gravel along the creek bottom.

There is no finding that any fraud or attempted fraud was committed. On the contrary the Commissioner, following the register and receiver, states:

Entry was made in good faith and with sufficient expenditure, but no mineral discovery had been developed.

The report of the mineral surveyor above quoted shows auriferous sands and gravel and indicates good faith on part of locators and that there was ground for belief that a discovery of valuable minerals had been made.

The entry was canceled because of lack of proof as to discovery. The amount of the claimants' expenditures clearly shows an honest belief on their part that a valuable deposit of placer gold might be developed on the premises, and this in connection with the fact that only a small amount of merchantable timber exists on the land, and the other facts in the case, tends to remove any suspicion of bad faith or fraud in connection with the entry and to establish the good faith of the entryman, even though their belief, so far as the record discloses, was not well founded. The claimants simply erred in their judgment in regard to discovery and the character of the land and have, by reason of their mistake, already suffered the loss of their expenditures and the cancellation of their entry.

Because of the lack of sufficient proof to establish discovery of mineral, entry was canceled or rejected, and under the circumstances, no actual or attempted fraud appearing, the Department is of opinion that the purchase money paid in connection with the entry is returnable under the provisions of the act of March 26, 1908 (35 Stat., 48), which reads as follows:

That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application.

In the case of Frank G. Bell (39 L. D., 191), the Department held (syllabus):

Mere error of judgment on the part of a timber and stone applicant in swearing that the land applied for is more valuable for timber than for agricultural purposes and is unoccupied, no bad faith or attempt at fraud appearing, is not sufficient ground for refusing repayment of the purchase money under the act of March 26, 1908, upon rejection of the application by the Department based upon a finding that the land is agricultural in character.

In the Bell case the entry was not erroneously allowed. In that case, Bell made a timber and stone entry stating the land was chiefly valuable for its timber. It was found after hearing, by Commissioner and this Department, that claimant erred and that the timber was so sparse as to make the land best fitted for agriculture. The entry was, therefore, not erroneously allowed nor was it canceled for conflict. Hence repayment was not specifically authorized under section 2 of the act of June 16, 1880 (21 Stat., 287).

It was held, however, that since Bell made an honest mistake in stating the land was chiefly valuable for its timber, and since no fraud or attempted fraud appeared repayment was authorized under the act of March 26, 1908 (above quoted).

In the case at bar there is not only no proof of fraud or attempted fraud, but a positive finding of "good faith" on the part of the locators.

While relief may not be specifically found in the act of June 16, 1880, *supra*, the latter act of March 26, 1908, clearly authorized the repayment applied for.

While the act of March 26, 1908, has been held merely supplemental to the act of June 16, 1880 (Joseph Gibson, 37 L. D., 338), it nevertheless affords relief in cases similar to the one at bar.

The action appealed from is reversed.

INSTRUCTIONS.

THREE-YEAR HOMESTEAD—ALASKA.

The three-year homestead act of June 6, 1912, is applicable to homestead entries in the District of Alaska.

First Assistant Secretary Adams to the Commissioner of the General Land Office, October 30, 1912.

The chief of the Alaskan field division, at Seattle, Washington, has asked you whether or not the provisions of the act of Congress approved June 6, 1912 (Public, No. 179), are operative in the Territory of Alaska, and you, under date of October 21, 1912, have submitted the matter to the Department for consideration.

Section one of the act of May 14, 1898 (30 Stat., 409), provided:

That the homestead land laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under the provisions of laws relating to the acquisition of title through soldiers' additional homestead rights, are hereby extended to the District of Alaska.

Section two of the act of March 3, 1903 (32 Stat., 1028), amending the act first cited, stated that "all the provisions of the homestead laws of the United States not in conflict with the provisions of this act, and all rights incident thereto, are hereby extended to the District of Alaska," and further specifically provided that no patent shall issue upon a homestead entry "until all the requirements of sections 2291, 2292, and 2305 of the Revised Statutes have been complied with as to residence, improvements, cultivation and proof, except as to commuted lands."

The general homestead laws, including sections 2291 and 2297, Revised Statutes, having been extended to and made applicable to the

Territory of Alaska, acts amending or modifying those laws, unless specifically limited or restricted, would also apply to that Territory. The act of Congress approved June 6, 1912 (Public, No. 179), amending sections 2291 and 2297, *supra*, reduced the required period of residence upon homestead entries from five to three years, and in other respects changed the requirements of said sections, and was not restricted in operation so far as Alaska is concerned. It, therefore, is applicable to the District of Alaska and should be applied to homestead entries therein. You will so advise the chief of field division.

PARAGRAPH 88 OF MINING REGULATIONS AMENDED.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, November 6, 1912.

REGISTERS AND RECEIVERS,

United States Land Offices.

GENTLEMEN: Paragraph 88 of the mining regulations, approved March 29, 1909 (37 L. D., 728-786), is hereby amended to read as follows:

Where an adverse claim has been filed, but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the State court having jurisdiction in the case, and also by the clerk of the district court of the United States for the district in which the claim is situated, will be required.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

APPLICATION TO CUT TIMBER IN ALASKA—AFFIDAVIT OF NON-OCCUPANCY.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, November 14, 1912.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Circular of April 29, 1909 (37 L. D., 615), issued under the act of May 17, 1906 (34 Stat., 197), concerning allotments to Indians and Eskimos, provides, in section 10, that persons applying to cut

timber shall file a corroborated affidavit to the effect that none of the lands covered by such application is embraced in any pending application for allotment under said act, or in any approved allotment, and that no part of such lands is in the *bona fide* legal possession of, or occupied by, any Indian or Eskimo.

The more recent circular of February 24, 1912 (40 L. D., 477), issued under section 11 of the act of May 14, 1898 (30 Stat., 414), concerning sale and use of timber upon unreserved public lands in the district of Alaska, provides, in section 3, that applicants to cut and purchase timber under said act shall file an application, duly witnessed by two witnesses, setting forth the facts therein specified. Said requirement does not include a statement as to whether the land is occupied by an Indian or Eskimo.

Owing to the difficulty of procuring the services of an officer before whom affidavits may be executed in Alaska, and especially in view of the fact that section 5 of the circular provides that a special agent shall investigate as to the truth of the statements made in the application, and is required to go upon the lands described to make such examination, it was designed to waive affidavit as to statements made in the application. The same reasons appear sufficient to justify waiver of affidavits at time of application, as to the statement required by section 10 of the said circular of April 29, 1909, but persons applying to cut timber under the said act of 1898, will be required to furnish the statement as provided in section 10 of the circular of April 29, 1909, as a part of the application, the same to be duly witnessed by two witnesses, as provided in section 3 of the aforesaid circular of February 24, 1912.

You will advise the local officers to this effect by letter, and also direct the special agents in Alaska to give special attention to this matter in making their examinations, so that the application may not be approved unless the land be free from the occupancy of Indians or Eskimos, and is not embraced in any allotment or pending application for allotment, and the special agent, at time of his investigation, should be required to take the affidavit of the applicant to cut, respecting the material features of his application, including the matters above set forth respecting allotment or occupancy of the land by Indians or Eskimos.

I have approved the telegram submitted by you for transmission to the local officers at Fairbanks, Alaska, waiving the requirement of affidavit in respect to such applications.

Very respectfully,

WALTER L. FISHER,
Secretary.

RULE 8 OF PRACTICE AMENDED.**RULES OF PRACTICE.**

DEPARTMENT OF THE INTERIOR,
Washington, November 15, 1912.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: I have your letter of the 9th instant recommending that the required period within which to commence publication, where service of notice of a contest is ordered by publication, be enlarged from ten to twenty days, and, after consideration of the representations made in your said letter, amendment of Rule 8 of Practice to conform to said recommendation is hereby ordered.

Very respectfully,

WALTER L. FISHER,
Secretary.

SOLDIERS' ADDITIONAL LOCATIONS IN ALASKA.**CIRCULAR.**

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 20, 1912.

UNITED STATES SURVEYOR GENERAL
AND REGISTERS AND RECEIVERS,
*United States Land Offices,
District of Alaska.*

GENTLEMEN: The third paragraph of circular No. 151, "Location of rights under sections 2306 and 2307, Revised Statutes, in the District of Alaska," approved July 31, 1912 [41 L. D., 116], is hereby amended as follows:

On approval of a survey by this office the Surveyor General will be advised thereof and directed to file a certified copy of the plat and field notes with the register and receiver, who will notify the applicant that within sixty days from a date to be fixed by them he must furnish the proofs and evidence of posting and publication required by the circular approved January 13, 1904 (32 L. D., 439, 441), and that in the event of his failure to take action the application will be rejected and the survey canceled. The register and receiver will at once mail a copy of the notice for publication to the chief of field division.

The purpose of the foregoing amendment is to authorize registers and receivers to fix the date within which the proofs must be furnished at such a time as it may be practicable for the applicant to comply therewith. Owing to the climatic conditions in the District of Alaska and the difficulty of reaching many sections thereof during even the most favorable part of the year, it is believed that to insist upon the applicant furnishing the proofs within sixty days from

notice would, in many instances, be equivalent to a denial of the right. Registers and receivers will not permit undue delay, but with their knowledge of conditions will fix reasonable dates for the furnishing of proofs.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

ALASKAN LANDS—PURCHASE FOR TRADE OR MANUFACTURE.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 20, 1912.

UNITED STATES SURVEYOR GENERAL
AND REGISTERS AND RECEIVERS,
*United States Land Offices,
District of Alaska.*

GENTLEMEN: All the provisions, requirements, terms, and conditions contained in and expressed by circular No. 151 of July 31, 1912 [41 L. D., 116], as this day amended, in so far as applicable, are hereby made and declared to be operative and in force in respect of applications to purchase lands for use in connection with any trade or manufacturing enterprise, or other productive industry, pursuant to the provisions of section 10 of the act of Congress approved May 14, 1898 (30 Stat., 409). The object of this regulation is to require applications for such purchases to precede survey of the lands sought to be acquired and to fix and limit the period of time within which such applications must be prosecuted to entry and patent; and, as well, to prescribe and impose a time limit upon the further procedure of persons claiming under surveys which may have been executed prior to the date borne hereby.

Any application for such a purchase which does not sufficiently disclose the applicant's possession of the lands therein described, and the use thereof for some one of the purposes for which, under the provisions of the statute above cited, they may be purchased, and which does not, in addition, disclose the character, extent and value of any improvements existing upon said lands and the purposes for which such improvements are used, will be disapproved and rejected; and no copy thereof need be furnished to the chief of

field division, nor will any statement concerning the application be delivered to the applicant for presentation to a deputy surveyor.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

COAL LANDS—SURFACE PATENT—PROSPECTING.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, November 21, 1912.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Paragraph 7 of the circular of September 7, 1909 (38 L. D., 183, 185), pursuant to act of March 3, 1909 (35 Stat., 844), is hereby amended so as to read as follows:

7. Where election to accept patent with the prescribed reservation has been made by the nonmineral claimant, coal deposits in the land may be prospected for, mined, and removed under the existing coal-land laws, provided the person desiring so to do first procures the consent of the surface owner, or furnishes such security for payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction. But no coal declaratory statement or application to purchase under sections 2347-2352 of the Revised Statutes, and the regulations of this office, will be received until the nonmineral claimant has elected to take a patent containing the prescribed reservation.

Appeals shall be allowed in all proceedings brought hereunder as in other cases.

Very respectfully,

SAMUEL ADAMS,
First Assistant Secretary.

INSPECTION OF SERIAL NUMBER REGISTERS IN LOCAL OFFICES.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, November 29, 1912.

REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: In response to the many inquiries received by and referred to this office, relative to the conditions under which the Serial Number Register may be examined by the general public, and

the extent of such examination as may be permitted, you are advised that this book is a public record and may be reasonably inspected by any person provided such examination may be made without interfering with the orderly dispatch of public business. Should you ascertain that any person is obtaining information therefrom for improper purposes, you will deny such person further access to the register and promptly report your action to this office.

The circular of April 16, 1910 (38 L. D., 575), is hereby revoked.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

UNITED STATES EX REL. McKENZIE v. FISHER.¹

In the Court of Appeals, District of Columbia.

MANDAMUS—SECRETARY OF THE INTERIOR—ENTRY OF LANDS.

The decision of the Secretary of the Interior, in the exercise of judgment and discretion, within the authority conferred by law, respecting the validity of an application to enter the public lands of the United States, will not be controlled by mandamus.

No. 2386. Submitted April 22, 1912. Decided May 6, 1912.

Hearing on an appeal by the relator from a judgment of the Supreme Court of the District of Columbia, discharging a rule to show cause why a writ of mandamus should not issue, and dismissing a petition therefor.

Affirmed.

The COURT in the opinion stated the facts as follows:

This was a petition to the Supreme Court of the District of Columbia for a writ of mandamus to compel the respondent, as Secretary of the Interior, to allow the application of petitioner to enter certain public lands of the United States, and in due course to issue a patent therefor. Respondent answered, to which answer petitioner demurred. The Court overruled the demurrer and entered a judgment for respondent, from which this appeal is prosecuted.

The facts briefly stated, are that in 1870 one Godsmark filed an application to enter 40 acres of land in the State of Michigan under the homestead laws of the United States. This entry was contested

¹ Reported in 39 App. D. C., 7, and printed with the permission and through the courtesy of Charles Cowles Tucker, Esquire, Reporter.

by one Hess, and in 1872 the entry was canceled. It is alleged that Godsmark was a soldier, and, therefore, entitled, under Sec. 2306, R. S., to make a soldiers' additional homestead entry. Petitioner is attempting to exercise the right which he claims to have acquired through mesne conveyance from Godsmark. His application was refused on the ground that the land Godsmark entered in Michigan had been granted, prior to his entry, to the State of Michigan for the benefit of the Amboy, Lansing, and Traverse Bay Railroad Company, and was, therefore, at the time of the entry, not public land subject to entry under the laws of the United States, and that Godsmark, not having entered land subject to entry, had not exhausted any portion of his homestead rights, and, consequently, had no additional right to dispose of under the provisions of section 2306, R. S.

Mr. D. N. Clark, Mr. Homer Guerry, and Mr. W. W. Wright for the appellant.

Mr. Charles W. Cobb, Assistant Attorney-General, *Mr. F. W. Clements*, First Assistant Attorney, and *Mr. C. Edward Wright*, Assistant Attorney, for the appellee.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

We are not called upon to determine the validity of the entry of Godsmark, or whether it gave him a right to an additional entry which petitioner, by purchase, could exercise. The authority is vested in the Secretary of the Interior by Congress to examine into and pass upon the validity of applications to enter the public lands of the United States. His decision in this instance not only involved the exercise of judgment and discretion, but was made in the discharge of a duty imposed by law. To grant this petition would require us not only to review the decision of the Secretary, but to determine matters essential to petitioner's right to make the entry, which have not, so far as this record discloses, been passed upon by the Secretary. Assuming that Godsmark did make a valid original homestead entry, before petitioner's application should be allowed the Department would have to investigate his military record, whether he had in fact assigned his right, and, if so, whether petitioner is the lawful assignee. Hence, we are not only called upon to review the decision of the Secretary, but to exercise original jurisdiction as to the determination of the above facts in a matter in which he is vested with exclusive jurisdiction. Mandamus will not afford the petitioner any relief. That writ can not be made to perform the function of a writ of error, and is not, therefore, available for the purpose of compelling the head of a Department of the Government to reverse a decision made in the exercise of the judgment and discretion reposed in him by the law, and which he had full jurisdiction to make. Neither will it issue to control the judgment and discretion of an officer in the decision of a matter in

which the law imposes upon him the duty of originally deciding for himself. *Decatur v. Paulding*, 14 Pet., 497, 515; *United States ex rel. Tucker v. Seaman*, 17 How., 225, 230; *Gaines v. Thompson*, 7 Wall., 347; *Litchfield v. The Register and Receiver*, 9 Wall., 575; *U. S. ex rel. McBride v. Schurz*, 102 U. S., 378; *U. S. ex rel. Dunlap v. Black*, 128 U. S., 40, 48; *U. S. ex rel. Riverside Oil Company v. Hitchcock*, 190 U. S., 316, 324; *U. S. ex rel. Ness v. Fisher*, U. S. Supreme Court, not yet reported. [223 U. S., 683.]

The question of law suggested is not a new one, and original discussion is unnecessary in the light of the above decisions. The action of the Secretary was neither arbitrary nor merely ministerial, but was taken in the exercise of judgment and discretion within the authority conferred by law. It can not, therefore, be controlled by mandamus.

The judgment is affirmed with costs, and it is so ordered.

Affirmed.

JOHN H. MASON.

Decided July 30, 1912.

SOLDIERS' ADDITIONAL RIGHT—ORDER OF SUCCESSION.

The order of succession to a soldiers' additional right is fixed by section 2307, Revised Statutes, first, to the widow, and second, in event of her death or remarriage before use or assignment of it, to the original entryman's minor children; and State laws and State courts are not competent to control, divest, or defeat the order of succession so fixed by statute.

SUCCESSION TO RIGHT UNDER SECTION 2307, R. S.

Upon the death of a soldier entitled to an additional right under section 2306, Revised Statutes, leaving persons qualified to take under section 2307, the right passes immediately to those entitled to the succession, and does not vest in his estate.

RIGHTS OF WIDOW AND MINORS.

Where the additional right passes to the widow, there being also minors, it is with the condition subsequent of divestiture in case of her death or remarriage without having used or assigned it; but upon passing to the minors the right becomes perfect and absolute in them, dependent upon no condition, qualification, or liability to divestiture.

RIGHT OF MINORS—FAILURE TO APPROPRIATE DURING MINORITY.

The right conferred upon the minor children by section 2307, Revised Statutes, is not conditioned upon appropriation thereof by a guardian during their minority, and failure to so appropriate it in no wise affects their title to the additional right under the statute.

CONFLICTING DECISION OVERRULED.

Allen Laughlin, 31 L. D., 256, overruled.

ADAMS, *First Assistant Secretary*:

John H. Mason appealed from decision of the Commissioner of the General Land Office of May 22, 1911, rejecting his application under section 2307, Revised Statutes, as assignee of additional homestead

right of Abner S. Sanders, to enter E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 18, T. 9 N., R. 2 W., S. B. M., Los Angeles, California.

October 22, 1909, Mason filed application at the local office based on enlistment of Sanders as private in Company A, 8th Regiment Indiana Volunteer Infantry, September 5, 1861, for three years, and his service until his discharge for disability in 1862, and original homestead entry of Sanders, October 17, 1866, No. 1062, Topeka, Kansas, for N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 12, T. 7 S., R. 11, canceled December 6, 1870, for abandonment. Mason's claim to ownership of Sanders's right is based on assignment by Savannah E. Ice, quondam wife and widow of Sanders, remarried and again a widow.

The matter was by the Commissioner of the General Land Office referred to a special agent for investigation, who, April 24, 1911, returned affidavits and report thereon based, that the assignor married Sanders April 15, 1871, his third wife, his first having died before his enlistment, with no issue of that union; that he married a second time, of which union there were two children, both now living; of the third marriage there was one child, now living; Sanders died in Delaware County, Indiana, August 8, 1875, all three of his now living children being then minors. His widow, the assignor, about eighteen months after Sanders's death, married one Lyons, with whom she lived four and a half years to his death; ten months later she married William Mason, with whom she lived to his death, after which she married William Ice, who died March 18, 1893, since which time she has remained unmarried, his widow.

In the record is certified copy of decree rendered in the Delaware County Circuit Court, Indiana, September 13, 1909, whereby the court, in a proceeding entitled "Estate of Abner S. Sanders, deceased," on petition of Savannah E. Ice, widow of Abner S. Sanders, supported by "Affidavit and Inventory heretofore filed by Ella O. Day," August 24, 1909, decreed:

The right to enter eighty acres of government land as a soldier's additional homestead right of Abner S. Sanders late private Co. A, 8 Rgt. Indiana Vol., under the provisions of Sec. 2306 and 2307 of the Revised Statutes of United States; based upon Homestead Entry No. 1062, made by Abner S. Sanders, October 17, 1866, for the North east quarter, Sec. 12, Town. 7 S. Rg. 11 E, in Kansas. The same being personal property, all mentioned and described in said petition and inventory, be and the same is hereby vested absolutely in the said Savannah E. Ice, widow of the said Abner S. Sanders, deceased.

This is in form, according to practice of that jurisdiction, an order in probate of Sanders's estate setting over to the widow chattel property by the court in probate of a decedent's estate. It is not a decree in an adversary proceeding by the claimant against heirs of decedent to quiet title to property claimed by each adverse party, and so is not such a decree as purports to adjudicate a title or settle rights of property as between parties.

On these facts the Commissioner held that, as there were three minor children of the soldier at time of her marriage to Lyons, she was divested of all right based on military service and former entry of her former husband Sanders, and such right vested in the minor children; that her assignment was invalid and not sufficient base for Mason's application for entry. The application was rejected, subject to appeal, which was taken and is now here for decision.

The questions presented are the order of succession to the additional right, and whether it is an asset of the soldier's estate disposable by the court, like other assets, in probate.

The statute provides:

Sec. 2307. In case of the death of any person who would be entitled to a homestead under the provisions of section two thousand three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvement therein contained.

It is noticeable that this statute does not deal completely with the subject of devolution of the right at the soldier's death, as it does not provide to whom it shall go in case there is no widow, or she remarry, and there are no minor children to take. So far as the statute goes, it is express and fixes the order of succession, so that State laws and State courts are not competent to control, divest, or defeat it. *Wilcox v. Jackson*, 13 Pet., 498, 516. Those named in the order of succession take by the statute making the grant. They are the beneficiaries of the statute. *McCune v. Essig*, 199 U. S., 382, 389. They on his death become the "qualified grantees." *Hall v. Russell*, 101 U. S., 503, 513.

The additional right being "property" under the decision in *Webster v. Luther*, 163 U. S., 331, at Sanders's death title passed immediately from him to those made his successors, and the right was never an asset of his estate, if qualified persons existed to take the succession.

Following that order of succession in the present case, on Sanders's death the widow succeeded to the ownership of his additional right, but with the condition subsequent of divestiture, that "in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits." In them the right becomes perfect, dependent on no condition, qualification, or liability to divestiture, for the law ends the line of succession with them. The right thus vested in them without condition of divestiture was their property, unconditioned, in private right, alienable only by their own act, as it was in their father, the first grantee. Subsequent termina-

tion of the widow's second marriage could not deprive them and re-vest her, or their father's estate, with title. There being no property in the estate, the probate order setting over the right to Mrs. Ice was inoperative for want of existence of the supposed subject-matter—title to the additional right.

Departmental rulings on this subject have not been entirely harmonious. In Williford Jenkins, 29 L. D., 510, the soldier died leaving no widow or minor children, and by will devised all his estate to his brother, who assigned the right, which was recognized as good, and duplicate of a lost certificate was allowed. But in Julia A. Lawrence (ib. 658), after issue of certificate of right to the soldier (Iretton), he died leaving a widow and three children. The widow remarried and applied for reissue to her of the certificate, then lost. The children had made assignments of their rights to her. The Department authorized reissue of the certificate, but, without statement that the children were not minors at time of the soldier's death, unnecessarily said: "The right is a proper asset of the estate of the deceased soldier to be administered as any other personal property." This was unnecessary to the decision, because if the children were minors when the father died, their assignment when of full age would carry the right to their mother, so that the conclusion reached was the proper one.

In Allen Laughlin, 31 L. D., 256, the soldier died leaving a widow and four minor children, who, after reaching majority, assigned the right, which was sought to be located by the assignee. The Department rejected the application and held:

Section 2307 of the Revised Statutes gives his widow, during her life and widowhood, the right to appropriate it to her use, and, in the event of her failure to appropriate it, gives his minor orphan children the right to appropriate it to their use, by a guardian duly appointed and officially accredited at the Department of the Interior. In this case it was not appropriated by either. The soldier's estate was never divested of the right. This could only be done by the act of the widow during her widowhood or on behalf of the children during their minority.

As now advised, the Department deems this erroneous and the decision is overruled. In John C. Mullery, 34 L. D., 333, 337, the foregoing decision was recognized, but as the personal representative "waived his right to sell," and obtained an order of court approving the sale made by the minor children after attaining majority, their assignment was recognized, and a right conclusion was reached. In John M. Maher, ib., 342, 344, the original entry was made by the widow and the additional right was her own. Unnecessarily discussing the additional right of the soldier had he made the original entry, it was said: "If he has no minor children, *or if the right is not exercised* or disposed of *during their minority* it reverts to his estate." Nothing in the case required a decision on this point.

In *Fidelo C. Sharp*, 35 L. D., 164, the succession was discussed and treated as one of mere right to appropriate the property, which, if not appropriated by the widow or minor children, remained always in the soldier's estate, the Department holding:

The right itself remains where it first lodged—in the estate of the soldier—subject only to the liability to be divested by the parties entitled to exercise the right of appropriation. This is the rule announced in the departmental decision rendered in the case of *Allen Laughlin* (31 L. D., 256) and reaffirmed in the later decision rendered in the case of *John C. Mullery et al.* (34 L. D., 333, 337) in the following language:

“Not being exercised or disposed of by his orphan children, during their minority, through a guardian, the estate of the soldier was not divested of said right.”

But, in fact, the soldier made a will devising his estate to his widow, under whom by intermediate assignments Sharp claimed. It does not appear there were minor children, so that for all that appears the conclusion was the proper one.

In *William E. Moses*, 37 L. D., 194, the soldier left a widow and minor children. The widow remarried. Two administrators of the soldier's estate, appointed in different county jurisdictions, each assigned the whole right. One of these the children, then of full age, recognized and confirmed by an assignment. The assignment to Moses, not so ratified, was rejected by the Commissioner. The Department held:

The right is property, and the statute fixing the order of its devolution makes no provision for divestiture of the children for benefit of her who was the soldier's widow in case her second marriage relation terminates, either by death of her second spouse or by divorce. An estate vested in the children will not be divested and revested in the former holder, the at one time widow, unless the statute so provides. Mrs. Mix's divorce did not take from the children the property, that had vested in them or revest her with a title that passed from her by her remarriage. The children became sole beneficiaries by her remarriage, without liability to be displaced in right by her in event she again became sole.

It should here be noted that the words of the statute “by a guardian duly appointed and officially accredited to the Department of the Interior” are not in form and can not be properly construed as a limitation or condition that the right must be exercised in behalf of the minor children during their minority. These words are in the nature of direction or suggestion how the minors, incapable of acting for themselves, may during minority obtain the benefits conferred. Had Congress intended that the right should expire or lapse, if not used during minority, such intent would have been expressed by appropriate words. Had Congress intended that during minority only the minor children might appropriate and obtain all the benefits, it would not have used the words “shall be entitled to all the benefits” without clear expression indicating by limitation over to whom the right should go ultimately, if they did not appropriate it during

minority, or that in such event it should lapse and determine. Having clearly expressed its solicitude for them by providing that on death or marriage of the widow, the minor orphan children shall be entitled to all its benefits, and no intent for lapse or other devolution of the right being expressed by Congress, no lapse or other devolution can be created by mere construction.

No reason appears to reconsider or overrule the construction of the statute given in William E. Moses, *supra*, and, in the view of the Department, section 2307, Revised Statutes, fixes the order of succession to the additional right to be, first, to the widow, and, second, in event of her death or remarriage before use or assignment of it, to the original entryman's minor children.

In the present instance, none of the three children has assigned, though one of them, Day, appears to have been a petitioning party, asking the court to set over the right to her mother, Savannah E. Ice, and as a consenting party was thereby concluded. William E. Moses, 37 L. D., 194, 196-7. But, as the other two children did not participate, the present applicant is not seized of their interests. The rejection of the application by the Commissioner is therefore, for reasons herein expressed, affirmed.

JOHN H. MASON.

Motion for rehearing of departmental decision of July 30, 1912, 41 L. D., 361, denied by First Assistant Secretary Adams, December 17, 1912.

ELLEN A. HARTING.

Decided August 7, 1912.

ENLARGED HOMESTEAD—CULTIVATION—CREDIT FOR MILITARY SERVICE.

An entryman in making proof of residence under the enlarged homestead act of February 19, 1909, is entitled, under section 2305 of the Revised Statutes, to credit for military service; but the provisions of said section can not be extended to relieve him from the specific requirements of the enlarged homestead act respecting cultivation.

ADAMS, First Assistant Secretary:

Appeal is filed by Ellen A. Harting from decision of October 4, 1911, of the Commissioner of the General Land Office affirming the action of the local officers and rejecting final proof submitted by her December 16, 1910, on her homestead entry made November 22, 1909, under the enlarged homestead act of February 19, 1909 (35 Stat., 639), for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 14, and NW. $\frac{1}{4}$, Sec. 23, T. 2 N., R. 28 E., Fort Sumner, New Mexico, land district, because of insufficient residence upon and cultivation of said land.

Said proof shows establishment of residence November 27, 1909, and continuance thereof to date of proof; also improvements valued at \$400 to \$500, and cultivation of 80 acres, planted to crops in the year 1910, no crop being harvested because of the drought.

The entrywoman appears to be entitled to credit under section 2305, Revised Statutes, for three years, eight months, and three days military service of her deceased husband, Samuel K. Harting. This period, with the residence shown in said proof, leaves a deficit of three months and two days, which the Commissioner required should be completed and also that cultivation should be continued in accordance with the provisions of said act, namely, of one-eighth of the land during the second year of entry and one-fourth thereof during the third, fourth and fifth years.

It is contended in this appeal that said requirement as to future cultivation of the land is not in accordance with law, and that credit on account of said military service should be extended to cultivation as well as to residence.

Section 4 of said act of February 19, 1909, requires, in the submission of proof on entries made thereunder, "in addition to the proofs and affidavits required" in making final proof on entries made under the Revised Statutes, proof also of cultivation of specified portions of the entry from year to year, as above stated. The specific requirement of said act of 1909 as to cultivation of entries made thereunder, obviously can not be affected by the previously enacted section 2305, Revised Statutes, allowing credit as to residence on homestead entries for military service.

Since this case was appealed, the act of June 6, 1912 (Public, No. 179), has been passed, but no proof having been offered thereunder, said act has not been considered.

The decision appealed from is affirmed.

DEAN v. ISAACS.

Decided August 17, 1912.

PRACTICE—CONTEST—NOTICE BY PUBLICATION.

The old Rules of Practice were superseded by the revised rules which went into effect February 1, 1911, and no jurisdiction is acquired by publication under the old rules of notice of a contest filed after such rules ceased to be operative.

ENLARGED HOMESTEAD—ADDITIONAL ENTRY.

After the submission of commutation proof upon a homestead entry such entry can not be made the basis for an additional entry under the enlarged homestead act of February 19, 1909, although payment of the commutation money had not been made at the time the additional application was filed.

ADAMS, *First Assistant Secretary*:

Appeal is filed by C. Kinsman Dean from decision of November 14, 1911, of the Commissioner of the General Land Office reversing

the action of the local officers and dismissing the contest filed by said Dean against the homestead entry made October 23, 1907, by George F. Isaacs, for the SW. $\frac{1}{4}$, Sec. 22, T. 30 S., R. 42 W., and his additional homestead entry made June 29, 1910, under the act of February 19, 1909 (35 Stat., 639), for the NW. $\frac{1}{4}$ of said section, Lamar, Colorado, land district, for the stated reason that Dean's contest affidavit does not set forth grounds warranting cancellation of said entries.

These lands were designated May 1, 1909, as subject to entry under said act.

Commutation proof was submitted on said original entry June 12, 1909, and was approved as sufficient by the Commissioner February 26, 1910, and Isaacs was notified that upon payment of the commutation money certificate would issue. Payment of said money was not made, but on May 17, 1910, Isaacs filed his application to make additional entry, which was allowed June 29, 1910, as stated.

Said contest affidavit filed January 14, 1911, charges—

That said original homestead entry was not made in good faith for the purpose of procuring a home, but for speculative purposes; that said George F. Isaacs offered final commutation proof for said land on June 12, 1909, that said proof was accepted, that afterwards, to wit, on May 17, 1910, he attempted to make additional homestead entry No. 08026, above described; that the said entryman on or about the time he offered said commutation proof, sold the land embraced in his said original homestead entry; for and in consideration of the sum of \$1,200, that he received the purchase money, being paid \$200 cash, and the remainder in horses and other property; that after receiving the payment for said land he failed and refused to pay the purchase money, as provided by the commutation law; that he is now offering his relinquishment for sale; affiant states that this action was premeditated and previously planned for the purpose of fraud and speculation; that if his relinquishment is now filed and accepted, his said fraudulent and speculative intent will have been fully accomplished.

By letter of March 20, 1911, the Commissioner held that this affidavit set forth sufficient charges, if proven, to defeat the entry, and notice was issued thereon, service by publication being made, however, under the old rules of practice. Hearing was had, the entryman making default, and the local officers found the charges to be sustained. The Commissioner held, in the decision appealed from, that no jurisdiction attached under the notice given, because of failure to comply with the rules of practice in force since February 1, 1911 (39 L. D., 395), and that, on reconsideration of said contest affidavit, the charges laid therein are believed to be insufficient in substance to warrant a hearing.

The Department concurs in the holding as to the question of jurisdiction. The last-mentioned rules of practice should have been complied with herein, and no jurisdiction attached under the notice

given under the old rules, which ceased to be operative prior to the acceptance of this contest affidavit.

The gist of the charge made in said affidavit is that this original entry was speculative; the allegations as to the submission of commutation proof, the sale of the original lands, the making of the additional entry, and the offer of a relinquishment of the lands, being matters of inducement to the charge of speculation rather than as constituting independent charges.

Furthermore, if such sale were in fact made after submission of proof the additional entry must fail for want of a subsisting original entry on which proof had not been made, which is requisite to support an additional entry. The fact payment of the commutation money had not been made would not affect such case, as upon payment thereof same would relate to the submission of the proof and operate to perfect the original entry as of that date, prior to the additional entry.

If such sale were prior to the submission of proof, both the original and the additional entry would be forfeited.

Hearing will therefore be had upon due notice to all interested parties.

The decision appealed from is reversed.

J. C. S. MINING COMPANY.

Decided September 28, 1912.

MINING CLAIM—PUBLICATION OF NOTICE.

The regulations respecting the publication of notice of an application for patent for a mining claim require that the notice shall appear in each issue of the designated newspaper published during the sixty-day period fixed by section 2325, Revised Statutes, excluding the first day of issue; and publication in only one issue each week of a triweekly newspaper, for the period of sixty days, does not meet the requirements of the statute and regulations.

ADAMS, *First Assistant Secretary*:

This case is before the Department on the appeal of the J. C. S. Mining Company from the Commissioner's decision of July 19, 1911, holding for cancellation its mineral entry 06181 for the J. C. S. No. 1 and other lode mining claims, surveys Nos. 6031 and 8016, situate in the Provo mining district, Salt Lake City land district, Utah, because of insufficient publication of notice.

The application, it appears, was filed January 10, 1910, notice whereof was advertised nine consecutive Tuesdays in the "Provo Post," a tri-weekly newspaper published Tuesdays, Fridays, and

Saturdays at Provo, Utah, the first notice appearing in the issue of Tuesday, June 14, 1910. The Commissioner objects to the sufficiency of the publication on the ground that the notice did not appear in each issue of the newspaper published during the required sixty-day publication period. The objection of the Commissioner is sound. The mining laws provide (see section 2325, Revised Statutes) that:

The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for a period of sixty days, in the newspaper to be by him designated as published nearest to such claim.

By paragraph 45 of the Mining Regulations it is provided that when publication is made in a weekly newspaper the notice shall appear in nine consecutive issues of the paper; but that "when in a daily newspaper the notice must appear in each issue for sixty-one consecutive issues," excluding, in each case, the first day of issue. They thus, in effect, require the notice to be advertised in each issue of the paper published during the required period of publication excluding the first day of issue. If the designated newspaper be one that is published weekly, the advertisement must be in nine consecutive issues of such paper to fulfill the requirement; if in a daily paper, the notice would be required to be advertised in sixty-one consecutive issues of the paper; if in a tri-weekly paper, the notice would be required to appear in each issue for sixty days. Inasmuch as the notice in this case appeared in but nine issues of a triweekly, the publication must be held to be insufficient to satisfy the requirements of the law. The jurisdiction of the local office to allow the entry being dependent upon advertisement and proper notice, the entry must be canceled.

It is accordingly so ordered and the decision appealed from is affirmed.

ELLEN M. SWEETLAND.

Decided September 28, 1912.

ISOLATED TRACT—ORDER OF SALE—WITHDRAWAL.

An order by the Commissioner of the General Land Office directing the sale of an isolated tract does not affect the authority of the President to thereafter withdraw the land for forestry purposes; and cash entry allowed upon sale of the land after such withdrawal is invalid.

ADAMS, First Assistant Secretary:

On November 23, 1906, the Commissioner of the General Land Office, upon the application of one Edward J. Baker, ordered the sale of the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 10, T. 3 N., R. 16 E., M. D. M., Sacramento, California, land district, as an isolated tract, under section

2455, Revised Statutes, as amended by the acts of February 26, 1895 (28 Stat., 687), and June 27, 1906 (34 Stat., 517).

By executive proclamation of October 26, 1907 (35 Stat., 2158), the above described tract was made a part of the Stanislaus National Forest.

On October 30, 1907, the local officers issued notice of the sale of said land and the same was duly published. It appears that the delay in the issuance of the notice was due to the fact that Baker was not advised of the allowance of his application until October 10, 1907.

On December 16, 1907, the date appointed for the sale, Ellen M. Sweetland, the highest bidder thereat, made cash entry for said land.

On November 20, 1911, the Commissioner of the General Land Office, citing the case of Svetozar Igali (40 L. D., 105), as authority for his action, held Sweetland's entry for cancellation, and her appeal from that decision brings the case before the Department.

It is urged by the claimant that the Igali case, referred to by the Commissioner, has no application, because, first, there had been no segregation of the land, in that case, upon the books of the local land office, and, second, the land was mineral in character and the withdrawal was from disposition pending legislation affecting the use and disposal of the mineral deposits; whereas, in the case under consideration, a proceeding by the Government upon the charge that the land is chiefly valuable for the timber thereon and that the purchase was made in the interest of a corporation, was dismissed.

As to the claimant's first contention, there is nothing in the Igali decision to sustain it; neither was the notation of the Commissioner's order of sale upon the records of the local office material to the issue presented in that case nor has it any bearing upon the validity of the entry under consideration. The proclamation establishing the Stanislaus National Forest excepted from its effect only—

All lands which are at this date embraced in any legal entry or covered by any lawful filing or selection duly of record . . . or upon which any valid settlement has been made, etc.

The proclamation revoked the order of sale issued by the Commissioner, no entry, filing, or selection having been made thereunder, and the action of the local officers in subsequently issuing notice of sale and selling the land was without authority and void. While for administrative reasons it has been found expedient to withhold isolated tracts from other disposition to private applicants after the Commissioner's order of sale has been noted upon the local land office records, such order can not affect the authority of the President to withdraw the land, whether for forestry purposes or for classification as to mineral or other value.

The failure of the Government to establish its charges that the land was chiefly valuable for timber and that claimant's entry was speculative, can not validate an entry made without authority of law. Moreover, the President may reserve, for forestry purposes, "public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not," under the provisions of section 24 of the act of March 3, 1891 (26 Stat., 1095, 1103).

The Commissioner's decision is, accordingly, affirmed.

STATE OF MONTANA.

Decided October 1, 1912.

REPAYMENT—FEES—ACT OF MARCH 26, 1908.

The act of March 26, 1908, specifically limits repayments thereunder to "purchase moneys and commissions," and furnishes no authority for repayment of "fees" paid in connection with applications for segregation under the Carey Act.

ADAMS, First Assistant Secretary:

The State of Montana has appealed from the decision of the Commissioner of the General Land Office, dated October 8, 1911, denying application for repayment of moneys paid in connection with applications for segregation under the Carey Act, lists Nos. 17 and 19, of certain lands in the State of Montana, which lists were held for rejection by the Commissioner of the General Land Office for the reason that a portion of the lands was not subject to segregation because of conflict and for the further reason that as to the remaining lands the showing submitted was insufficient to warrant segregation.

After the lists were held for rejection the State filed a relinquishment or withdrawal of its application.

Section one of the act of March 26, 1908 (35 Stat., 48), provides:

That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the treasury of the United States under any application to make any filing, location, selection, entry or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall be guilty of any fraud or attempted fraud in connection with such application.

The moneys asked to be repaid consist of fees of \$1.00 for each 160 acres of land included within the application lists submitted by the State and are denominated and treated as "fees." See act July 1, 1864 (13 Stat., 335), and paragraph seven of section 2239 of the Revised Statutes.

The act of June 16, 1880 (21 Stat., 287), authorizing repayments in certain cases, specifically refers to "fees," "commissions," and "purchase money," but the act of March 26, 1908, under which repayment in this case must be made, if at all, for such lands as were at time of application vacant and subject to selection, specifically confines repayments to "purchase moneys and commissions." It must be concluded from the language used in the latter act that Congress did not intend that fees paid to local officers in such cases should be repaid and that return of moneys was designedly limited to purchase moneys and to the commissions specifically provided for in certain cases by the law. The decision of the Commissioner is accordingly affirmed for the foregoing reasons, which renders consideration of the question raised by the appeal and by the Commissioner's decision, as to the alleged relinquishment of the selection by the State, unnecessary.

RAMAGE v. BECKWORTH.

Decided October 1, 1912.

SECOND DESERT ENTRY—ABANDONED ENTRY—QUALIFICATIONS—ACT MARCH 26, 1908.

A desert entryman who had actually abandoned his entry, and which was subject to cancellation on the ground of abandonment, at the date of the act of March 26, 1908, is within the provisions of that act, and is not disqualified to make second desert entry thereunder merely because his abandoned entry is still of record.

ADAMS, First Assistant Secretary:

January 24, 1907, George E. Wright made desert land entry 3693, at Los Angeles, California, for land described as NE. $\frac{1}{4}$, Sec. 18, T. 16 S., R. 15 E., S. B. M., which he assigned to Janet A. Ramage June 2, 1908. Ramage has offered three annual proofs—the first, June 19, 1908, the second, April 13, 1909, and the third, June 24, 1910—the first two of \$160 each and the last of \$168. A resurvey having been made under authority of the act of July 1, 1902 (32 Stat., 728), she, upon December 7, 1909, filed an application to adjust her entry to the following description: Lots 1, 4, and 5, Sec. 13, T. 16 S., R. 14 E., and lots 1 and 2, Sec. 18, T. 16 S., R. 15 E., according to the resurvey.

June 1, 1909, Cornelius W. Beckworth filed his application to make second desert land entry for lots 1, 4, and 5, Sec. 13, T. 16 S., R. 14 E., S. B. M., according to the resurvey. This application was rejected by the register and receiver June 16, 1910, because of conflict with the application for adjustment by Ramage. Beckworth appealed to the Commissioner who, upon October 13, 1910, directed a hearing to determine the rights of the parties.

After hearing, in accordance with the Commissioner's order, the register and receiver, by their decision of September 14, 1911, recommended that the application of Ramage, as far as in conflict with that of Beckworth, be rejected. Their recommendation was affirmed by the Commissioner in his decision of January 16, 1912, from which an appeal has been prosecuted to the Department.

The record discloses that Wright, the assignor of Ramage, in reality claimed upon the ground land known as the NE. $\frac{1}{4}$, Sec. 5, T. 16 S., R. 15 E., according to a private survey which may be termed the Imperial Survey. After making his entry, he filed notices to that effect upon the NE. $\frac{1}{4}$, Sec. 5. He made his entry as of the NE. $\frac{1}{4}$, Sec. 18, for the reason that the description NE. $\frac{1}{4}$, Sec. 5, had already been used by some one else. Ramage, when she purchased the entry from Wright in June, 1908, did so through an agent, prior to examining the land. She apparently had no knowledge that Wright was claiming the other tract, but endeavored to claim land described as the NE. $\frac{1}{4}$, Sec. 18, T. 16 S., R. 15 E., according to the Imperial Survey. In the latter part of 1907, Cornelius W. Beckworth went into possession of the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 18, T. 16 S., R. 15 E., according to the Imperial Survey. He erected a small cabin and proceeded to do some reclamation work, and, apparently, has been in possession of that tract ever since. Ramage did not take assignment from Wright until June, 1908, and when her agents went upon the ground they were informed by Beckworth of his claim to the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and all of the work since done for Ramage has been upon the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said Sec. 18, not claimed by Beckworth. The local officers rightly held therefore upon the record:

That the land to which Ramage seeks to amend was not that selected and entered by Wright, that it was not the NE. $\frac{1}{4}$, Sec. 18, Tp. 16 S., R. 15 E., by the survey of 1856, that neither Wright nor Ramage was ever in possession of the tract in dispute.

Assuming that Beckworth was qualified there would be no question but that the judgment must be in his favor, and, indeed, appellant merely argues that Beckworth was disqualified to make further claim under the desert-land law, and that therefore his pending application can not be allowed in face of the intervening claim of Ramage. Respecting this feature of the case, the record shows Beckworth made desert-land entry, No. 4212 (serial 04908), November 5, 1907, at Los Angeles, for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 1, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 12, T. 16 S., R. 11 E. This was canceled August 8, 1910, upon the contest of one M. C. Bosworth, filed January 13, 1910. Beckworth testified that, at the time of making his first desert land entry, he was of the opinion that the same could be irrigated from a ditch to be constructed by one of the irrigation companies in the Imperial Valley;

that, however, having ascertained that the land was too high, he abandoned the same and never performed any work thereon. While the exact time of his abandonment of the former entry is not clear, it is evident that he had abandoned it long prior to the assertion of any right by Ramage to the tract in controversy, and prior to the passage of the act of March 26, 1908 (35 Stat., 48). He also seems to have executed a relinquishment for his prior entry before a notary public, but the date of this relinquishment does not appear and it seems never to have been transmitted to the local land office. The appellant contends, however, that Beckworth could not become qualified to make second desert land entry until his first entry had been canceled of record.

The act of March 26, 1908 (35 Stat., 48), authorizing the making of second desert land entries, is similar in its language to that of February 8, 1908 (35 Stat., 6), allowing second homestead entries. Under the act of February 8, 1908, the Department held, in *Liberty v. Moyer* (38 L. D., 381), that a homesteader who had actually abandoned his entry, and which was subject to cancellation on the ground of abandonment at the date of the act of February 8, 1908, comes within the provisions of that act and is not disqualified, as a settler with a view to second entry thereunder, by reason of the fact that his first and abandoned entry was still of record. A similar holding was made in *Walton et al. v. Monahan* (29 L. D., 108), under the second homestead act contained in section 13 of the act of March 2, 1889 (25 Stat., 980).

Beckworth accordingly was duly qualified to make second desert entry while in possession of the tract and prior to the assertion of any rights thereto by Ramage and also at the time he filed his application therefor. After a thorough consideration of the entire record, the Department finds no error in the concurring conclusions below, and the decision of the Commissioner is accordingly affirmed.

REED v. ST. PAUL, MINNEAPOLIS, AND MANITOBA RY. CO.

Decided October 3, 1912.

SETTLEMENT—ENTRY OF NONCONTIGUOUS TRACTS—EQUITABLE ADJUDICATION.

Where by inadvertent action of the land department in issuing patent to a railway company for a tract of land embraced in a settlement claim the remaining tracts embraced in the settlement claim are rendered noncontiguous, the settler may be permitted to make entry of the remaining tracts notwithstanding their noncontiguity with the view of submitting the entry to the Board of Equitable Adjudication for confirmation.

ADAMS, *First Assistant Secretary*:

Charles W. Reed appealed from decision of the Commissioner of the General Land Office of March 31, 1911, requiring him to elect

which of two noncontiguous tracts he would take as his homestead entry, lot 4, or W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 3, T. 39 N., R. 6 E., W. M., Seattle, Washington.

May 5, 1902, the railway company filed at the local office application to select, with other land, the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 3, T. 39 N., R. 6 E., W. M., under act of August 5, 1892 (27 Stat., 390). Plat of survey was filed in the local office February 6, 1907. On the same day Reed filed in the local office his homestead application for lot 4, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 3, alleging settlement November 24, 1906. February 23, 1907, the company applied to conform said selection to the lines of survey. April 23, 1908, patent was issued to the Great Northern Railway Company, successor in interest to the selecting company, for SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, thus breaking into two noncontiguous tracts of forty and eighty acres, respectively, the contiguous tract which Reed claimed under his settlement and for which he applied to make entry.

At the same time as Reed's application for entry John Carlson applied for the SW. $\frac{1}{4}$ of the section, and Henry W. Parrott made timber and stone application for the same tract. A hearing was ordered and held at the local office December 1, 1909, to determine the rights as between themselves of Reed, Carlson, and Parrott as to W. $\frac{1}{2}$ SW. $\frac{1}{4}$. January 21, 1910, the local office allowed Reed's application as to W. $\frac{1}{2}$ SW. $\frac{1}{4}$, rejecting the applications of the two adverse claimants.

February 9, 1910, Reed filed in the local office a protest, asking for rehearing between himself and the railway company as to the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 3, and that the patent to the railway company be canceled.

The Commissioner held that, as the railway selection was filed nearly four years prior to Reed's settlement, his application must be rejected, and thereupon ruled him to elect which of the remaining noncontiguous parts of his settlement claim he would enter.

It was error of the General Land Office to issue patent to the railroad company while an undisposed of settlement claim was existing against it. There should have been a hearing between the railway company and the selector as to priority of right. Affidavits filed by Reed show that the land in question was settled upon by one J. W. Tincker during 1901, he being a qualified settler entitled to take a homestead entry and intending so to do. He remained in possession until August, 1906, when he sold his settlement claim to Walter M. Smithey, who intended to make a homestead entry of it, but, November 24, 1906, sold it to Charles W. Reed for a valuable consideration, who then took possession and has been in possession ever since.

If these allegations are true, then the land was not subject to the railroad selection of May 5, 1902, having been previously settled upon and claimed by Tincker, a qualified settler under the homestead laws; for, by the act of 1892, according to the company a right of selection, such right is limited to—

an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey, which has been or shall be made, of the United States, not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any State, into or through which the railway owned by said railway company runs, to the extent of the lands so relinquished and released.

Both at the time of the filing of the original selection for unsurveyed lands and at the time of its adjustment to the lines of the survey, the tract in question was embraced within the claim of an actual *bona fide* settler. A hearing should, therefore, have been ordered between Reed, the homestead applicant, and the railway company. Patent having issued, however, to the railway company, the tract has passed beyond the jurisdiction of this Department. Reed should not suffer for such error of the Land Department, and if he is willing to accept the remainder of the tracts embraced in his claim he should be allowed to perfect title thereto, notwithstanding such tracts are rendered noncontiguous by reason of the erroneous issue of patent to 40 acres of the land to the railway company. *De Simas v. Pereira* (29 L. D., 721). Unless, therefore, it is found desirable to further investigate the allegations respecting settlement, made in support of Reed's application, the same will be allowed, and, if perfected, in the absence of other objection, may be submitted to the Board of Equitable Adjudication for confirmation.

The decision appealed from must be, and is, accordingly hereby reversed and the case remanded for further consideration and action in accordance with this opinion.

FRANK C. JONES.

Decided October 10, 1912.

DESERT ENTRY WITHIN RECLAMATION PROJECT—EXTENSION OF TIME.

Section 5 of the act of June 27, 1906, authorizing an extension of time for compliance with law on desert entries within reclamation projects, applies only to entrymen who have been directly or indirectly delayed or prevented from carrying out their plans and works for obtaining a water supply by creation of a reclamation project.

ADAMS, First Assistant Secretary:

Frank C. Jones appealed from decision of the Commissioner of the General Land Office of December 6, 1911, denying application

for extension of time for making annual proof on his desert-land entry for SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 4, T. 10 N., R. 23 E., W. M., North Yakima, Washington.

March 24, 1909, Jones made entry, on which he has submitted two annual proofs showing preparatory work looking to reclamation of the land, at expenditure of \$290. September 5, 1911, he filed corroborated affidavit asking extension of time under act of June 27, 1906 (34 Stat., 520), showing that "The Valleys of the Yakima Water Users Association" was incorporated February 5, 1910, to construct high line irrigation canal to aid and assist the Reclamation Service in irrigating and reclaiming land along such canal and its branches, and it is generally understood that the Reclamation Service intends to extend and complete works to irrigate and reclaim lands above the present Sunnyside canal including this tract. Among other things, the affidavit says:

That at the time of such entry affiant expected to obtain water from wells, springs, floodwater, dams or ditches for reclaiming his said land, or as an alternative method he expected to obtain water from said proposed high-line canals, which had not then been organized but it was generally believed that the same would be organized and supported by the Government.

The act provided that where a *bona fide* desert-land entry has been made within limits of an irrigation project—

and the desert-land entryman has been or may be directly or indirectly hindered, delayed, or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land withdrawal or irrigation project, the time during which the desert-land entryman has been or may be so hindered, delayed, or prevented from complying with the desert-land law shall not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert-land entry: *Provided*, That if after investigation the irrigation project has been or may be abandoned by the Government, time for compliance with the desert-land law by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith.

This act clearly contemplates extension of time to a desert entryman for delay caused to him in development of his contemplated plan of reclamation by interference of the Government and its constructions. The application shows no such foundation for a claim. When he made the entry he expected to irrigate from "wells, springs, flood water, dams, or ditches." He in no way indicates or claims in what manner any constructions or proposed works of the project has prevented execution of his own contemplated plans to obtain a water supply, or has prevented their efficiency, if constructed. For all that he shows he merely abandoned his plan in hope that water would be brought to him by the project constructions. The act applies only to entrymen who have been directly or indirectly delayed or prevented from carrying out their own plans and works for obtain-

ing a water supply by creation of a reclamation project. Circular of September 30, 1910 (39 L. D., 253, 268, paragraph 35).

The decision is affirmed.

MALONE v. STATE OF MONTANA.

Decided October 18, 1912.

CONTEST—CAREY-ACT SELECTION—PREFERENCE RIGHT.

No preference right of entry can be secured by contest against an application for segregation of lands under the Carey Act.

CAREY-ACT SELECTION—APPLICATION TO ENTER.

An application for segregation of lands under the Carey Act while pending precludes other disposition of the lands; and applications to enter lands embraced in pending selections under that act will not be received and suspended to await final action upon such selections, nor will any rights be recognized an initiated by the tender of such applications.

ADAMS, *First Assistant Secretary*:

January 18, 1909, the State of Montana filed application for the segregation, under the Carey Act, of lots 3 and 4, Sec. 3, T. 26 N., R. 2 W., and approximately 160,000 acres of other lands, Greatfalls land district.

May 4, 1911, Carlton K. Malone filed in the local land office his application to contest the segregation application as to lots 3 and 4, Sec. 3, alleging inadequacy of water supply for the entire project and that the State was not in position to reclaim the lands in connection with the other tracts applied for. Malone's application was rejected and appeal was taken by him to the Commissioner of the General Land Office. August 31, 1912, the Commissioner affirmed the action of the register and receiver on the ground that prior to the filing of Malone's application to contest, proceedings had already been initiated by the Department to determine the sufficiency of the water supply, and that all matters alleged by Malone could be determined by such proceeding; also, that the apparent theory of applicant that a preference right of entry could be secured through such a contest was erroneous, and that no rights superior to those of the general public could be secured, even were the contest allowed and the selection canceled. Appeal from this decision has been taken to the Department, error in the Commissioner's decision being alleged as follows:

1. Error in holding that the allowance of the contest would not be helpful to the Department in determining the merits of the Carey application:

2. Error in holding that there is no authority of law for contests against segregation lists under the Carey Act.

Under the rules and regulations of the Department governing applications for segregation of lands under the Carey Act, it is the practice to investigate such selections in the field to determine the

sufficiency of the water supply, the character of the lands sought to be segregated, the feasibility and practicability of the proposed works, and any and all other material facts bearing upon or relating to the proposed project. Such investigation was initiated in this case and the selection list has ever since its filing been under field or office investigation with respect to pertinent matters involved.

Malone's attempted contest conveyed no new information to the United States, nor would its allowance have aided this Department in properly adjudicating same. No good reason, either in law or practice, exists for entertaining such a contest, and Malone could have secured no advantage over others even had his contest been allowed, a hearing ordered, and the selection canceled because of evidence adduced.

The act of May 14, 1880 (21 Stat., 140), provides for a preference right of entry in preemption, homestead, and timber-culture entries, the cancellation of which has been procured by a contestant who has paid the land office fees and submitted evidence requiring cancellation. Neither in letter or spirit do the provisions of this act apply to the case of an application for the segregation of lands under the Carey Act, and, as intimated, even had Malone's contest been entertained, he could have secured no preference right of entry in the event of the cancellation of the selection. The Commissioner's decision is accordingly affirmed.

It further appears from the record that on May 14, 1911, Malone presented an application to enter lots 2 and 3, Sec. 3, under the homestead laws, which application was rejected by the register and receiver, July 31, 1911, because the lands were embraced in the pending application of the State under the Carey Act, list No. 10. Upon appeal, the Commissioner of the General Land Office affirmed this action. Appeal from this decision has also been prosecuted to the Department, error on the part of the Commissioner being alleged as follows:

1. In not suspending Malone's application pending approval or rejection of the State's application.
2. In failing to hold that the homestead application, so presented and rejected, became effective as the equivalent of an entry on August 18, 1911, when the Commissioner of the General Land Office rejected the State's application.

Under the practice of the Department the filing in the local land office of an application for segregation of lands under the Carey Act, has been uniformly treated as precluding other disposition of the lands pending consideration and action upon the Carey selection. This ruling is warranted and required both by the purpose and intent of the act and by good administration. To receive and suspend subsequent applications during the pendency of a prior application for a tract of land, would lead to confusion and might inter-

fere with the proper administration and disposition of the public lands. This rule has been applied even where the prior selection was erroneously received. Under this necessary and proper rule it follows that if the subsequent entry or application may not be received or allowed, no rights can be recognized as initiated by the tender of such application.

It is therefore held that in this instance the application of Malone, made for lands covered by a prior pending Carey Act selection, was properly rejected and that no rights were acquired by the presentation of his application. The appeal which he prosecuted from the action of the register and receiver and from the affirmance of the Commissioner of the General Land Office, entitles him to a decision as to the correctness of the action taken at the time it was taken, and the fact that the State selection may have, during the pendency of his appeal, been rejected, does not revive or give any effect to an application theretofore properly rejected. The Commissioner's decision of June 25, 1912, is affirmed.

MALONE v. STATE OF MONTANA.

Motion for rehearing of departmental decision of October 18, 1912, 41 L. D., 379, denied by First Assistant Secretary Adams, December 18, 1912.

MARION L. BOOKOUT.

Decided October 19, 1912.

ENLARGED HOMESTEAD—ADDITIONAL ENTRY.

One who made homestead entry for less than 160 acres and subsequently made additional entry under section 6 of the act of March 2, 1889, for an amount of land which together with the original entry aggregates 160 acres, is not entitled to make further entry under section 3 of the enlarged homestead act as additional to the entry made under said section 6 of the act of 1889.

ENLARGED HOMESTEAD—ACT OF AUGUST 24, 1912.

The act of August 24, 1912, validating certain entries theretofore allowed under the enlarged homestead act, applies only in instances where at the time of making the enlarged entry the entryman had "acquired title to a technical quarter-section of land under the homestead law" containing less than 160 acres; and has no application where the entryman at the time of making the enlarged entry had acquired title to 80 acres under an original homestead entry and had a subsisting additional entry under section 6 of the act of March 2, 1889, for a tract of land in a different quarter-section which together with the original entry aggregated 160 acres.

ADAMS, *First Assistant Secretary*:

April 18, 1901, Marion L. Bookout made homestead entry at Oklahoma City, Oklahoma, for 80 acres of land upon which final certificate issued September 15, 1906, and patent issued May 9, 1907.

October 15, 1906, said entryman made homestead entry for lots 1 and 2, Sec. 1, T. 15 N., R. 34 E., New Mexico, containing 80.27 acres, under section 6 of the act of March 2, 1889 (25 Stat., 854).

June 24, 1909, he made additional homestead entry for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ of said section 1, containing 80 acres, which tract is contiguous to the land embraced in the entry which was made under the act of 1889. The last named entry was made under section 3 of the act of February 19, 1909 (35 Stat., 639), known as the enlarged homestead act.

It has been held by the Department that where a person has acquired title to a tract of land under section 2289, R. S., he is not qualified to make an entry under the enlarged homestead act; that he is restricted to an aggregate area of 160 acres, as provided by section 6 of the act of March 2, 1889, *supra*. See instructions of April 2, 1912 (40 L. D., 526). Said instructions did not have particular reference to cases where an entry had been made under section 6 of the said act of 1889, but it would be a mere evasion of said rule to allow a person to first make entry under said section and then to permit him to make entry additional thereto under section 3 of the enlarged act. Furthermore, the first entry made by this claimant was for land remote from the land embraced in his enlarged entry and was not designated as of the character subject to entry under the enlarged act. Therefore, allowance of his enlarged entry was in violation of the provisions of section 3 of the enlarged act, which permitted entry only of lands contiguous to the former entry, and only upon condition that final proof has not been made upon the former entry.

In this case the entryman had made two entries prior to the date of the enlarged entry, one of which was remote and upon which proof had been made. Clearly section 3 of the enlarged act does not apply in a case of this kind. However, the Commissioner has transmitted the case for consideration under the recent act of August 24, 1912 (Public, No. 328), and has recommended that the said enlarged entry be declared valid under that law. Therefore, the provisions of said last mentioned act will be considered. The act reads as follows:

That all pending homestead entries made in good faith prior to September first, nineteen hundred and eleven, under the provisions of the enlarged homestead laws, by persons who, before making such enlarged homestead entry, had acquired title to a technical quarter section of land under the homestead law, and therefore were not qualified to make an enlarged homestead entry, be, and the same are hereby, validated, if in all other respects regular, in all cases where the original homestead entry was for less than one hundred and sixty acres of land.

This case does not come within the letter of said remedial act, because the entryman, at the time of making the enlarged entry, had

not "acquired title to a technical quarter section of land under the homestead law." Neither is it within the spirit of the act, because the entryman had acquired title to 80 acres and was in the process of acquiring title to 80.27 acres in addition, making a total of 160.27 acres, so that he had fully exhausted his homestead right. Whereas, the intendment of said act is to validate enlarged entries only in cases where prior to such entry a technical quarter section had been acquired, embracing an area of less than 160 acres.

Inasmuch as the remedial act has no application in this case, and as the entry is otherwise invalid, it is directed that the said additional entry under the enlarged act be held for cancellation. The case is remanded to the General Land Office for action, as here indicated.

ERNEST B. GATES.

Decided October 21, 1912.

SOLDIERS' ADDITIONAL—DEATH OF SOLDIER—REMARRIAGE OF WIDOW.

No right of additional entry under sections 2306 and 2307 of the Revised Statutes exists where prior to June 8, 1872, the date the law now embodied in said sections was enacted, the soldier had died, leaving a widow but no children, and the widow had remarried and was at that date a married woman.

CONTRARY DECISION OVERRULED.

Santa Fe Pacific R. R. Co. v. Peterson, 39 L. D., 442, overruled.

ADAMS, *First Assistant Secretary*:

Ernest B. Gates, assignee of Mary Ann Kreger, administratrix of the estate of Fidel Huter, deceased, has appealed from the decision of the Commissioner of the General Land Office, dated February 7, 1912, rejecting his application to enter, under sections 2306 and 2307, Revised Statutes, the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 25, T. 55 N., R. 13 W., 4th P. M., Duluth, Minnesota, land district.

In his said decision, the Commissioner of the General Land Office held that, while under the facts of the case a soldiers' additional right to the extent of forty acres had inured to the estate of Huter, its attempted assignment to Gates was invalid. In view of the conclusion, hereinafter reached, that no such right existed, the Department finds it unnecessary to consider the question presented by the alleged assignment thereof.

Huter, the soldier, served as a private in Company "B", First Regiment, Minnesota Heavy Artillery, from September 21, 1864, to June 29, 1865, and made a homestead entry, on January 2, 1863, for 120 acres of land, at the Minneapolis, Minnesota, land office, which was changed to a pre-emption cash entry, upon which patent was

issued. He died on June 29, 1865, leaving a widow, but no children; the widow remarried in 1866, and her second husband is alive.

From the foregoing it will be seen that on June 8, 1872, when the law now embodied in sections 2306 and 2307, Revised Statutes, was enacted, there was neither soldier, widow nor minor child to receive the benefit thereof; the right has never vested and neither has nor ever had legal existence. In the case of *Santa Fe Pacific R. R. Co. v. Peterson* (39 L. D., 442), it was held, by implication, that the survival of the soldier, his widow, or minor child at the date of the passage of the act of June 8, 1872, *supra*, was not necessary to the existence of the additional right, and certain cases are cited as authority for such holding, of which not one is in point, there having been a surviving widow, apparently, in each case, on June 8, 1872.

The decision of the Commissioner of the General Land Office is, accordingly, affirmed with the modification that the alleged additional right has no validity, and the case of *Santa Fe Pacific R. R. Co. v. Peterson* is hereby overruled.

ERNEST B. GATES (ON REHEARING).

Decided December 18, 1912.

RES JUDICATA AND STARE DECISIS.

While the rules of *res judicata* and *stare decisis* should be considered and respected by the Secretary of the Interior, he is not precluded thereby from taking proper action in any matter remaining subject to his jurisdiction.

ADAMS, *First Assistant Secretary*:

Counsel for Ernest B. Gates filed motion for rehearing of departmental decision of October 21, 1912 (41 L. D., 383), rejecting his application, as assignee of soldiers' additional right of Fidel Huter, to locate it on the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 25, T. 55 N., R. 13 W., 4th P. M., Duluth, Minnesota.

The application was rejected because the soldier died before June 8, 1872, when the additional right was granted (17 Stat., 333), leaving no children, and his widow remarried in 1866, also prior to said act. The Department held that, as there was neither soldier, widow, nor child to take benefit of the act, no additional right arose. Error is assigned that (1) prior construction of the act of June 8, 1872, is overturned; (2) that such changed construction is applied to affect rights acquired under the prior one; (3) violation of the rule of *stare decisis*.

The executive departments are not judicial tribunals, though having to exercise judicial power. In the particular case before it, the Department, to reach a result, must necessarily pronounce a decision

upon the rights of the party. The final act in such proceeding fixes the rights of the parties and creates a right of property in the thing, or *res*, subject of decision, which the Secretary himself, or his successor, can not revoke or take away. *Moore v. Robbins*, 96 U. S., 530, 534; *United States v. Schurz*, 102 U. S., 378, 402; *United States v. Stone*, 2 Wall., 525, 555; *United States v. Minor*, 114 U. S., 232. Examination of the cases cited shows, however, that lack of power in the executive department to proceed further is not based on the doctrine of *res judicata*, but on loss of jurisdiction over the *res* by passing of title.

On the other hand, if the *res* remains subject to executive action, the rules of *res judicata* and *stare decisis* do not prevent proper action. In *Knight v. United States Land Association*, 142 U. S., 161, 181, the court held:

The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out and that none of the public domain is wasted or disposed of to a party not entitled to it. He represents the Government, which is a party in interest in every case involving the survey and disposal of the public lands.

To the same effect is *Williams v. United States*, 138 U. S., 514, 524.

These principles forbid that the doctrine of *stare decisis* should control the Secretary in discharge of his duties. Of the doctrine of *stare decisis*, Bouvier's Law Dictionary, Edition of 1897, *ad verba* says:

The doctrine of *stare decisis* is not always to be relied upon; for the courts find it necessary to overrule cases which have been decided contrary to principle. It should not be pressed too far; 8 Gr. Bag 257. Many hundreds of such overruled cases may be found in the American and English reports. It is held that it should require very controlling considerations to induce any court to break down a former decision, and lay again the foundations of the law; 7 How. (Miss.) 569.

The doctrine is one to be considered and respected, but concludes neither the courts nor the executive departments, and prior different construction of a statute does not conclude the Secretary or the court when found to be wrong.

The Department is satisfied that the intent of the act of June 8, 1872, *supra*, was to confer a further right of entry upon the soldier and those directly dependent upon him. This is evidenced by limitation of the succession to the "minor orphan children" of the soldier to exclusion of children of full age. Children of full age had themselves a homestead right, and to benefit the minor children succession was fixed to the widow and the minors. As in this case, there was neither soldier, widow nor minor child at date of the act granting the right, there was no one to take benefit of the grant.

The motion is denied and the former decision is adhered to.

IDA B. SPRAGUE.

Decided October 29, 1912.

RULE OF APPROXIMATION.

The rule of approximation as applied to entries under the public-land laws is merely a rule of administrative expediency and is not a right.

ADDITIONAL HOMESTEAD—APPROXIMATION—SECTION 6, ACT OF MARCH 2, 1889.

The right of additional entry accorded by section 6 of the act of March 2, 1889, is for such an amount of land as "added to the quantity previously so entered by him shall not exceed one hundred and sixty acres;" and one who made an original homestead entry for 20 acres is not entitled, by invoking the rule of approximation, to make an additional entry under said section for 160 acres, and so acquire in the aggregate 180 acres.

ADAMS, *First Assistant Secretary*:

The appeal in this case raises the question as to the right of the claimant, Ida B. Sprague, to enter, under the provisions of section six of the act of March 2, 1889 (25 Stat., 854), 160 acres of land in the Lewiston land district, Idaho, she having previously and on November 18, 1903, made a homestead entry for lot 4, Sec. 26, T. 35 N., R. 3 W., of the said land district, containing 20 acres, upon which entry she submitted commutation proof and patent issued November 2, 1906.

Section six of the act of March 2, 1889, provides:

That every person entitled, under the provisions of the homestead laws, to enter a homestead, who has heretofore complied with or shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry, so much additional land as added to the quantity previously so entered by him shall not exceed one hundred and sixty acres: *Provided*, That in no case shall patent issue for the land covered by such additional entry until the person making such additional entry shall have actually and in conformity with the homestead laws resided upon and cultivated the land so additionally entered, and otherwise fully complied with such laws: *Provided, also*, That this section shall not be construed as affecting any rights as to location of soldiers certificates heretofore issued under section two thousand three hundred and six of the Revised Statutes.

It will be observed that the amount of land that may be entered as additional to the previous homestead entry is limited to an amount which, when "added to the quantity previously so entered by him shall not exceed one hundred and sixty acres." In the present instance the aggregate amount of the two entries is 180 acres and the full amount is sought to be retained under what is known as the rule of approximation, upon the theory that to exclude one of the legal subdivisions, amounting to 40 acres, would make the defi-

ciency 20 acres, and, therefore, that as the excess, which amounts to 20 acres, does not exceed the deficiency, which would also amount to 20 acres, claimant should be allowed to retain the full tract.

Now, in the first place, the so-called rule of approximation is a rule merely of administrative expediency and not of right. Indeed, the legality of its application is in many cases at least doubtful. Under section 2289 of the Revised Statutes, a person is entitled to enter under the homestead laws "one-quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands." Under the irregularities of the public survey, for one reason or another, it has seemed expedient in some cases to permit entry under the homestead laws of an amount 'somewhat in excess of 160 acres, even though the entry does not embrace a technical quarter section. In this case, however, claimant has already had the privilege of the homestead law under the entry previously made and perfected. The additional right is not one to make another homestead entry without limitation, but is limited in acreage to an amount, which, when "added to the quantity previously so entered by him shall not exceed one hundred and sixty acres." The amount here applied for is far in excess of that amount, and there was no error committed by the Commissioner of the General Land Office in requiring elimination of one of the subdivisions applied for. Said decision is accordingly hereby affirmed.

LEATH v. POPE.

Decided October 29, 1912.

HOMESTEAD ENTRY—QUALIFICATION—OWNERSHIP OF LAND.

Where a homestead applicant holds lands under color of title by tax deed and claims them as his own, the land department will not undertake to probe minutely the title thereto, to determine whether the State law relating to tax sales was in all respects complied with; and in the absence of an affirmative showing to the contrary by the applicant, he will be held the "proprietor" thereof within the meaning of the provision of section 2289 of the Revised Statutes declaring disqualified to make homestead entry one who is the proprietor of more than 160 acres of land.

ADAMS, *First Assistant Secretary*:

H. Jefferson Pope appealed from decision of the Commissioner of the General Land Office of April 17, 1912, canceling his homestead entry for E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 31, and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 32. T. 1 N., R. 8 W., Gainesville, Florida.

May 4, 1903, Pope made entry; October 20, 1908, submitted final proof; and July 15, 1909, received final certificate. September 23, 1909, J. W. Leath filed contest affidavit charging that Pope owned more than one hundred and sixty acres at date of entry and was thereby disqualified. November 16, 1909, the Commissioner ordered a hearing, which was had, both parties appearing, and January 29, 1910, the local office found for contestant and recommended cancellation of the entry. On successive appeals, the finding was affirmed by the Commissioner and Department; the entry was canceled, and February 6, 1911, the case was closed. On a motion for review and rehearing, March 20, 1911, the Department held the motion insufficient, but suspended final action to allow Pope on a further hearing to show invalidity of his apparent title to S. $\frac{1}{2}$, Sec. 35, T. 1 N., R. 9 W., which appeared to disqualify him to make his homestead entry. On Pope's application such supplemental hearing was had, both parties appearing. The local office again found Pope disqualified, and that was affirmed by the Commissioner. This appeal is from that decision.

The land in Sec. 35, ownership of which is claimed to disqualify Pope, was sold at auction April 2, 1889, for delinquent tax of 1888, by the collector of revenue for Calhoun County, to Martin O'Neal and C. L. Harrell, to whom February 14, 1891, the State Circuit Court Clerk, the proper officer, made a tax deed for this and other land. January 28, 1893, the administratrix of O'Neal's estate, John D. Harrell, Charles L. Harrell, and the Harrell wives deeded it, with warranty, to H. J. Pope, the entryman. Parts of the land Pope deeded with general warranty, October 27, 1902, reducing his holding to 200 acres. He made no conveyance reducing this amount of land.

At the supplemental hearing Pope introduced a witness to show that there was no certificate or affidavit of the tax collector to the list of lands sold April 1, 1889, that it is a true and correct list of lands then sold for non-payment of taxes for the year 1888, though the land was in fact so sold to M. O'Neal and C. L. Harrell; also that the tax sale record showed an affidavit of W. R. Shields, editor and proprietor of the weekly newspaper "Southern Good Templar," that notice of the tax sale was published in that paper March 6, 13, 20 and 27, 1889. As the law of Florida requires such certificate to the list of lands sold for taxes, and also requires a four-weeks' publication of notice of tax sale, counsel for Pope argues that the tax sale was void, conveying no title. Counsel cite decisions of the Supreme Court of Florida and in *Keech v. Enriquez*, 28 Florida, 97, 10 S. Rep., 91; and *City of Miami v. M. R. L. & G. Co.*, 57 Flor-

ida, 366, 29 S. Rep., 55, to the effect that the law for tax sales must be strictly pursued or tax sale is invalid.

This may be conceded, and had the sale been attacked in time, it may be conceded the sale would have been annulled. Considering such was the fact, yet the tax deed, and also the deed of O'Neal's administratrix and the Farrells to Pope, January 28, 1893, being on their face in due form, constituted color of title. *Cairn v. Haisley*, 22 Fla., 317.

The evidence shows that Pope cultivated parts of the land so conveyed to him in each year from 1903 to 1907, and paid taxes assessed thereon against him each year from 1902 to 1908, inclusive, and exercised dominion over it as owner. Section 1721, General Statutes of Florida, provides that adverse possession under claim and color of title for seven years vests absolute title in such claimant.

It thus appears at least probable that Pope might well have claimed and successfully asserted good title to this land at the time of making his homestead entry. He apparently has asserted such title by giving warranty deeds to 120 acres of the land. There is nothing in the record to show that Pope has in any way given up possession of the land or acknowledged the defect in his title on which his counsel now insist. The Department can not undertake to probe minutely the title of homestead applicants to lands which they are holding under color of title and claiming as their own.

The Department concludes therefore that the local officers and the Commissioner, on the facts, properly found that Pope who had the affirmative failed to show he was not "the proprietor of more than one hundred and sixty acres of land," and failed to show that he was qualified to make his homestead entry.

The decision is affirmed.

EUGENE F. WINDECKER.

Decided October 29, 1912.

RECLAMATION ENTRY—AMENDMENT OF FARM UNIT—ADJUSTMENT OF PAYMENTS.

Where after entry of a farm unit within a reclamation project the farm-unit plat is amended and the entryman in conforming his entry to the amended plat retains only part of the land originally entered, he is entitled to have the payments theretofore made on account of building charges and on account of the Indian price for the land credited to the retained portion, but is not entitled to have the payments on account of operation and maintenance so credited.

ADAMS, *First Assistant Secretary*:

On April 2, 1909, Eugene F. Windecker made homestead entry for farm unit "A" or lot 1, Sec. 4, T. 2 N., R. 29 E., and the SE. $\frac{1}{4}$ SE.

¼, Sec. 33, T. 3 N., R. 29 E., M. P. M., Huntley Irrigation Project, Billings, Montana, land district, containing 87.33 acres of irrigable land, subject to the provisions of the act of June 17, 1902 (32 Stat., 388), and a water right certificate was issued to him on the same day.

On August 17, 1911, an amendment of the farm unit plats of these townships was approved, whereby farm unit "A" was canceled and farm units "F" and "R" were created of lot 1, Sec. 4, and the SE. ¼ SE. ¼, Sec. 33, respectively, the first containing 49.8 and the second 37.5 acres of irrigable land.

On December 6, 1911, the Commissioner of the General Land Office conformed the entry to farm unit "R," upon Windecker's application, and adjusted his payments on account of the building charge to the reduced acreage, but refused to so adjust the payments made on account of the operation and maintenance charge and the purchase money due the Indians. The claimant's appeal brings the matter before the Department.

The Commissioner's action, with respect to the building charge, is in accord with the practice of the Department in such cases. See regulations of December 18, 1911 (40 L. D., 312). As to the payments made on account of the Indian price for the land, the case presented is identical in principle with that of payments upon the building charge and unlike payments for operation and maintenance, which are annual charges to cover the cost of supplying entrymen with water and are earned by the Government whether the water is or is not used.

While it is true that the amendment of the farm unit plats was at the instance of the claimant, the application to conform the entry to farm unit "R" was not in the nature of a relinquishment by him of farm unit "F," as held by the Commissioner. The amendment of the farm unit plats, whatever the reason therefor, was the act of the Government, and Windecker having elected to retain one of the new units, the cancellation of the entry as to the other followed as a logical necessity.

In the unreported case of Zelmer H. Moses, involving the W. ½ E. ½, Sec. 29, T. 5 N., R. 6 E., Wyoming, the Department held, on June 3, 1908, that a party who had made a second entry for Indian lands was entitled to credit for payments made upon the first entry for lands of the same class, which had been abandoned and relinquished, though not entitled to credit for fees and commissions paid on account of the first entry.

The decision of the Commissioner is, accordingly, affirmed as to payments for building and for operation and maintenance and reversed as to payments on account of the Indian price.

LOUIS G. TRIEBEL.

Decided October 30, 1912.

ADDITIONAL HOMESTEAD—ACT OF APRIL 28, 1904—COMMUTATION.

Additional homesteads under the act of April 28, 1904, are not subject to commutation.

ADDITIONAL HOMESTEAD—APPROXIMATION—AGGREGATE AREA.

One who made homestead entry for less than 160 acres can not, by making additional entry and invoking the rule of approximation, be permitted to secure a greater area of land in the aggregate than he might have embraced in his original entry.

ADAMS, *First Assistant Secretary*:

On May 5, 1910, Louis G. Triebel made homestead entry for lot 3 (19.7 acres) and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 17, lot 1 (14.15 acres), lot 4 (25 acres) and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 20, T. 23 N., R. 21 W., Kalispell, Montana, land district.

On April 3, 1911, Triebel made, under the act of April 28, 1904 (33 Stat., 527), additional homestead entry for NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, of said section 17, after he had been advised by the Commissioner of the General Land Office that he could not be permitted to do so.

On July 10, 1911, Triebel submitted commutation proof upon both entries and cash certificate was issued thereon.

The Commissioner of the General Land Office, in his decision dated January 26, 1912, held for cancellation the additional entry and the cash certificate as to the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, section 17, and rejected the proof as to that subdivision, upon the grounds that the act of April 28, 1904, forbids the commutation of additional homestead entries and that said additional entry violated the rule of approximation. Triebel was, however, allowed the option of relinquishing one of the subdivisions in his original entry, in which event the additional entry was to be held intact, subject to five-year proof at the proper time. Triebel has appealed to the Department.

When he made his original entry, Triebel might have embraced therein one hundred and sixty acres; having entered 138.85, he was entitled to make an additional entry for 21.15 acres; thus, he could secure by means of the original entry plus the additional entry no more land than he might have embraced in the original entry. Had he applied to make an original homestead entry for the 178.85 acres described in his cash certificate, it would have been incumbent upon the local officers to require him to reduce the area sought to approximately one hundred and sixty acres. He had no right, therefore, to an additional entry for forty acres until he had first reduced the original entry to one hundred and twenty acres.

Triebel should not be permitted to validate his additional entry by eliminating from the original entry lot 1 of section 20; such elimination would not reduce the entire area now sought by him to 160 acres but would make lot 4 noncontiguous to the other tracts; and the latter reason also forbids the relinquishment of the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, section 17, if the additional entry is desired to remain of record. With the modification that Triebel may validate the additional entry by relinquishing lot 3 of section 17, or lot 4, or the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of section 20, the decision appealed from is affirmed. In any event the additional entry would not be subject to commutation.

RUNYAN v. SPURGIN.

Decided November 4, 1912.

PRACTICE—HEARING—DISQUALIFICATION OF LOCAL OFFICERS.

The disqualification imposed by the act of January 11, 1894, upon registers and receivers to sit in a hearing in any cause pending in any local office where such officer is related to any of the parties in interest can not be waived by consent of the parties; and any proceeding had in contravention of the statute is without jurisdiction and void.

ADAMS, *First Assistant Secretary*:

James W. Runyan appealed from decision of the Commissioner of the General Land Office of November 1, 1911, dismissing his contest against Henry J. Spurgin's homestead entry for W. $\frac{1}{2}$ and SE. $\frac{1}{4}$, Sec. 6, T. 23 N., R. 26 W., 6th P. M., Broken Bow, Nebraska.

August 24, 1904, Spurgin made entry, against which, October 4, 1910, Runyan filed contest affidavit, alleging that Spurgin never made actual *bona fide* residence; never improved or cultivated his land; has abandoned the same and lived elsewhere for more than six months last past.

December 7, 1910, hearing was held at the local office, both parties being present with counsel. At date not shown, the local office found for contestant, recommending cancellation of the entry. The Commissioner reviewing the evidence reversed the local office and dismissed the contest. The receiver was uncle of contestant.

The act of January 11, 1894 (28 Stat., 26), provides:

That no register or receiver shall receive evidence in, hear or determine any cause pending in any district land office in which cause he is interested directly or indirectly, or has been of counsel, or where he is related to any of the parties in interest by consanguinity or affinity within the fourth degree, computing by the rules adopted by the common law.

SEC. 2. That it shall be the duty of every register or receiver so disqualified to report the fact of his disqualification to the Commissioner of the General Land Office, as soon as he shall ascertain it, and before the hearing of such cause, who thereupon, with the approval of the Secretary of the Interior, shall designate some other register, receiver, or special agent of the Land Depart-

ment to act in the place of the disqualified officer, and the same authority is conferred on the officer so designated which such register or receiver would otherwise have possessed to act in such case.

It is noticeable that this statute not only disqualifies the officer, but deals completely with the situation and provides how the matter shall thereafter proceed. There is no room under such a statute to hold that an officer not objected to or challenged may sit, disqualification being regarded as waived.

In *McClaghry v. Deming* (186 U. S., 49) the court was called upon collaterally upon proceedings of *habeas corpus* to review the action of a court-martial constituted of regular officers to try an officer of the volunteer forces. The seventy-seventh article of war provided:

Officers of the Regular Army shall not be competent to sit on courts-martial, to try the officers or soldiers of other forces, except as provided in article 78.

The court held:

As to the officer to be tried there was no court, for it seems to us that it can not be contended that men, not one of whom is authorized by law to sit, but on the contrary all of whom are forbidden to sit, can constitute a legal court-martial because detailed to act as such court by an officer who in making such detail acted contrary to and in complete violation of law. . . . The act of constituting the court is inseparable from the act which details the officers to constitute it. It is one act, and the court can have no existence outside of and separate from the officers detailed to compose it. By the violation of the law the body lacked any statutory authority for its existence, and it lacked, therefore, all jurisdiction over the defendant or the subject matter of the charges against him. It is said, in *Keyes v. United States*, 109 U. S. 336, that where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment. . . . The case at bar differs in all these facts, and the court, having been illegally constituted, had no jurisdiction to try the offender for any offence whatever, even with his consent. . . . It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important, in that respect, that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his peculiar suit should be justly determined; but the State, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind.

In *Moses v. Julian* (45 New Hampshire, 52; 84 Am. Dec., 114) the distinction between ground of challenge and absolute statutory disqualification is fully discussed, the conclusion being that where the statute disqualifies the judge, reasons of public policy forbid that such disqualification shall be waived by consent of the party.

In *People v. De La Guerra* (24 Cal., 73, 78) the distinction and the result of statutory disqualification is discussed and the same conclusion is reached.

American and English Annotated Cases, Vol. 10, adjudged in the Supreme Court of Indiana (167 Ind., 76) hold, in substance, citing many authorities, that for reasons of public policy a statutory disqualification can not be waived by the party. In *Cyclopedia of Law and Procedure*, Vol. 23, page 583, a large number of cases are cited and discussed going to the effect that waiver can not be made of the disqualification of a judge for relationship or affinity to the party where the statutory disqualification is express, with no provision for its waiver.

In view of the Department, upon the statute cited, the disqualification of one of the local officers is absolute, which for reasons of public policy is incapable of being waived by the parties. It follows therefore that the proceedings in the local office were *coram non judge*. All proceedings subsequent to the contest notice are therefore without force and void.

The decision of the Commissioner and findings of the local office are reversed and vacated, and the case is remanded to the General Land Office with instructions that further proceedings herein must be taken in accordance with the act of January 11, 1894, *supra*.

DENNIS BELL.

Decided November 6, 1912.

RECLAMATION HOMESTEAD—ASSIGNMENT—ACT OF JUNE 23, 1910.

The act of June 23, 1910, authorizing the assignment of parts of homestead entries within reclamation projects, has no application to entries which prior to that act had been adjusted to farm units and canceled as to the residue, after due notice; and an attempted assignment under that act of land so eliminated as residue is without authority of law and can not be recognized.

ADAMS, *First Assistant Secretary*:

October 7, 1908, Dennis Bell made homestead entry 04761, at the Williston, North Dakota, land office, for lots 1, 2, and 3, and the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 6, T. 150 N., R. 104 W., Lower Yellowstone reclamation project, subject to the provisions of the act of June 17, 1902 (32 Stat., 388). January 13, 1909, he made final homestead proof and the register and receiver issued final certificate. September 11, 1909, the Commissioner of the General Land Office held the final certificate for cancellation as prematurely issued upon a reclamation homestead entry prior to reclamation of the land and payment of construction charges, and required the entryman to make application to conform his entry to farm unit A, covering lots 1, 2, and 3 of Sec. 6, containing approximately 81 acres, or farm unit B, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 6, containing approximately 40 acres.

The entryman had previously filed a letter asking to be allowed to retain the entire area, and made no response to the decision of the

Commissioner requiring him to conform, which appears to have been served by registered mail. Thereupon, under date of February 3, 1910, the Commissioner canceled the final certificate and conformed the entry to farm unit A, or lots 1, 2, and 3, Sec. 6.

July 18, 1911, the register and receiver forwarded to the General Land Office the assignment of Dennis Bell and his wife, Eugenie, dated June 20, 1911, of farm unit B, or the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 6, to Anna Bell, under the provisions of the act of June 23, 1910 (36 Stat., 592). The assignment was rejected on the ground that the entry had been conformed to a farm unit prior to the passage of the act of June 23, 1910, and the assignee had failed to show that she is qualified to take and hold an assigned reclamation farm unit.

Appeal has been filed in this Department, together with statements of Dennis and Anna Bell. Dennis Bell swears that he made the assignment in good faith; was not aware that his homestead entry had been canceled to that extent, and that he does not remember having received any notice thereof; that he can not read or write and that possibly the notice, if received, was never read to him. He also states that the money received from Anna Bell for the assignment has been used to pay debts, and that he is unable to reimburse her. A number of Mr. Bell's neighbors corroborated his statements. Anna Bell, who is a daughter of the entryman, has submitted an affidavit to the effect that she purchased the assignment in good faith for her own use and benefit; paid for it with her own money; and that she has not acquired title to any other farm unit or entry under the reclamation act.

The entryman's final proof shows continuous residence on the land since October, 1903, and cultivation of 12 acres in 1903, 32 acres in 1904, 52 acres in 1905, 90 acres in 1907, and that he has now approximately 100 acres in cultivation.

The conformation of this entry to farm unit A and its cancellation as to the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 6, or farm unit B, occurred prior to the passage of the act of June 23, 1910 (36 Stat., 592), authorizing the assignment of homestead entries in part. The act is operative only upon entries pending at the date of its passage and entries thereafter made, and neither directly nor by implication applies to entries conformed or canceled prior to June 23, 1910. In this case, as above recited, the entry was adjusted to a farm unit and canceled as to the residue after due notice, the case closed, and the records duly noted long prior to the enactment of the assignment law. That law can have no operation here, and the attempted assignment executed by Mr. Bell June 20, 1911, can not be recognized.

The decision of the Commissioner rejecting the attempted assignment to Anna Bell is therefore affirmed. However, in view of the equities of the assignee and there being no adverse claim or right to

the land, the Commissioner will notify Anna Bell that she will be allowed thirty days from notice within which to make homestead entry for said farm unit B, if qualified, thereby enabling her to secure title to the land through compliance with the homestead laws, as amended by the reclamation act. In the event of her failure to make entry therefore the land will, at the expiration of the period named, be held subject to disposition to the first qualified applicant.

MINING LAWS AND REGULATIONS THEREUNDER.

CIRCULAR.

The circular of United States mining laws and regulations thereunder, approved March 29, 1909 (37 L. D., 728), reprinted in pamphlet form November 6, 1912, without change therein except the substitution of paragraphs 33, 42, 44, and 88, as amended, and the insertion of legislation and regulations relating to mineral lands adopted since the approval of said circular, the addenda being as follows:

Instructions of June 11, 1909 (38 L. D., 40); June 25, 1910 (39 L. D., 49); March 6, 1911 (39 L. D., 544); June 15, 1911 (41 L. D., 91); July 7, 1911 (40 L. D., 215); July 29, 1911 (40 L. D., 216); January 9, 1912 (40 L. D., 347); October 8, 1912 (41 L. D., 294); October 21, 1912 (41 L. D., 345); October 29, 1912 (41 L. D., 347).

INSTRUCTIONS.

SEGREGATION, CLASSIFICATION, DESCRIPTION, AND ENTRY OF COAL LANDS BY MINOR SUBDIVISIONAL AREAS.

The land department has full authority to ascertain, segregate, and classify coal areas of public lands in two-and-one-half or ten-acre tracts, or multiples thereof, described as minor subdivisions of quarter-quarter sections or rectangular lotted tracts, where conditions are such as to render this course desirable and necessary; the minor subdivisional areas so segregated, classified, and described, to be regarded and treated as legal subdivisions for the purpose of entry under the coal-land laws, and the remaining noncoal area in the forty-acre subdivision being subject to disposal under appropriate laws.

CONFLICTING DECISION OVERRULED.

Mitchell *v.* Brown, 3 L. D., 65, will no longer be followed.

Secretary Fisher to the Director of the Geological Survey, November 15, 1912.

In your letter of July 8, 1912, you requested information as to whether coal lands could be classified, in certain cases where it was desirable so to do, in tracts of less than forty-acre legal subdivisions

and, in that connection, you suggested that to paragraph 11 of the regulations governing the classification and valuation of coal lands, approved April 10, 1909 (37 L. D., 653), there be appended the following:

Where it is for any reason advisable, classification may be made by subdivisions of ten acres or of two and one-half acres each.

Your inquiry has been submitted to the Commissioner of the General Land Office, for his consideration and report. The Department is now in receipt of the Commissioner's report of August 29, 1912, wherein, after citing section 2347, Revised Statutes, which prescribes that a coal land applicant only has "the right to enter by legal subdivisions" and the land office decision in the case of *Mitchell v. Brown* (1884—3 L. D., 65), where it was held that: "There is no authority for segregating the coal from the other land within a forty-acre legal subdivision," he concludes with the recommendation that the proposed amendment be not adopted.

The Department, after mature consideration, has reached a different conclusion. The last sentence in section 2331, Revised Statutes, reads as follows:

And where, by the segregation of mineral lands in any legal subdivision, a quantity of agricultural lands less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or preemption purposes.

This provision first appears as a proviso to section 10 of the act to promote the development of the mining resources of the United States, approved May 10, 1872 (17 Stat., 91, 94). Under authority of this statute, it has been the practice to segregate mineral lands, both lode and placer, from the agricultural lands, within any legal subdivision, and to hold the agricultural lands subject to nonmineral disposition and the mineral area subject to mineral appropriation. The placer areas so segregated, where possible, are described in terms of minor subdivisions of quarter-quarter sections (20 or 10-acre tracts and, in some cases, lesser areas), or, if irregular, such areas are defined by special survey delimiting the placer deposits. Lode areas are segregated by special surveys corresponding to lode locations. Where the mineral area is defined and segregated by a special survey on the ground, the remainder of the forty-acre tract or legal subdivision is designated on the official plats as an agricultural lot, which is given an agricultural lot number, with specified area. See the mining regulations, paragraphs 37 and 110 (37 L. D., 764, 778). Where no special survey is required, as is the case where placer ground described in terms of minor subdivisions of quarter-quarter sections is involved, the remainder of such legal subdivision is held subject to disposition under the proper nonmineral laws, in accordance with appropriate minor subdivisional descriptions and, in such

case, no amendment of the official plat is deemed necessary or in fact made. A similar practice obtains where small-holding claims, Indian allotments, and forest homesteads are so laid as to be described in subdivisational terms as parts of regular quarter-quarter sections or rectangular lots. See paragraph 8 of instructions of December 16, 1908 (37 L. D., 355, also 38 L. D., 481).

The coal-land statute, act of March 3, 1873 (17 Stat., 607), has been included in the Revised Statutes as sections 2347-2352, inclusive, under chapter 6 entitled "Mineral Lands and Mining Resources" of title XXXII, "The Public Lands." It has been repeatedly held by the courts and by this Department that coal lands are mineral lands within the purview of the public-land laws. See *Mullan v. U. S.* (118 U. S., 271, 278); *Colorado Coal and Iron Co. v. U. S.* (123 U. S., 324, 327); *T. P. Crowder* (30 L. D., 92), and *Brown v. Northern Pacific Ry. Co.* (31 L. D., 29).

Section 2331, R. S., provides for "the segregation of mineral lands in any legal subdivision" and for the agricultural disposition of the remaining area. Coal lands being mineral lands are thus clearly susceptible of segregation, under the provisions of the statute, from the adjoining noncoal lands. When coal lands are so segregated by due ascertainment and classification, under appropriate minor subdivisational descriptions, the agricultural lands remaining in the forty-acre tract are clearly made subject to disposal, pursuant to the proper laws; and conversely, the coal land tract so segregated, classified, and described, being vacant coal land of the United States, must, under these circumstances, be held to be subject to disposition under the coal land laws, such minor subdivisational coal areas being regarded and treated, for this purpose, as legal subdivisions because so segregated.

Where original agricultural lots on meandered boundaries or on the north and west of a township may be involved, it may become necessary to amend the official plats in order to properly adjust lottings, but this will be rather exceptional and will ordinarily involve office work only.

The Department, therefore, concludes that the power and authority exist to ascertain, segregate, classify and describe coal areas in two and one-half or ten-acre tracts, or multiples thereof, in terms of minor subdivisational descriptions of quarter-quarter sections or rectangular lotted tracts, where conditions are such as to render this course desirable and necessary. Accordingly, an amendment to the present regulations governing classification and valuation of coal lands has been made to permit of such procedure. [See 41 L. D., 399.]

The holding announced in the case of *Mitchell v. Brown* (3 L. D., 65), which precludes the segregation of coal lands, and the practice

based thereon, will no longer be followed, and in the future the conclusions herein set forth will govern where coal areas are involved.

A copy of this letter has been furnished to the Commissioner of the General Land Office, for his information and guidance in the premises.

CLASSIFICATION OF COAL LANDS.

REGULATIONS.¹

DEPARTMENT OF THE INTERIOR,
Washington, November 15, 1912.

DIRECTOR OF THE GEOLOGICAL SURVEY AND

COMMISSIONER OF THE GENERAL LAND OFFICE.

SIRS: The regulations governing the classification and valuation of coal lands, approved April 10, 1909 (37 L. D., 653), are hereby amended by adding to paragraph 11 thereof the following:

Where for good reason it is advisable, classification of coal lands may be made by two and one-half or ten-acre tracts, or multiples thereof, described as minor subdivisions of quarter-quarter-sections or rectangular lotted tracts.

Very respectfully,

WALTER L. FISHER,
Secretary.

ORCHARD MESA POWER CANAL.

Decided December 2, 1912.

WATER RIGHTS—PRIOR APPROPRIATION.

Under the statutes of Colorado, prior appropriation of water from a river gives the appropriator a right to only so much of the natural flow of the river as is applied by him to beneficial uses, and does not entitle him to have the natural flow of the river maintained in order that the amount of water appropriated by him shall continue available under the particular method adopted by him to carry it to the land upon which it is used; and so long as sufficient water is left in the river to meet the prior appropriation and beneficial use, the prior appropriator can not lawfully or equitably complain of the diversion of other waters of the river through appropriation and beneficial use, even though such appropriation and diversion should so lower the level of the river as to necessitate the adoption by him of other methods of transferring the water appropriated by him from the river to the lands upon which it is used.

ADAMS, *First Assistant Secretary:*

Messrs. A. M. Stephenson, of Denver, and S. G. McMullin, of Grand Junction, Colorado, have, on behalf of the owners of the Orchard Mesa Power Canal, filed in this Department petition, state-

¹ See page 396.

ment of facts, brief and argument in connection with the proposed construction of the Grand Valley reclamation project by the United States under the act of June 17, 1902 (32 Stat., 388), and the diversion of a portion of the waters of Grand River for the irrigation of lands in the project.

It appears from the records before me that in 1889 notice of appropriation of 110.7 second feet of the water of Grand River, for agricultural purposes, was filed by the owners of the power canal; that in 1898 another notice of appropriation of 139.3 second feet was filed by the same parties for the same purpose, making a total claim of 250 second feet; that this appropriation was confirmed by a referee appointed by the District Court and approved by the court July 22, 1912. The United States does not admit that the entire amount of these appropriations is needed for or used in the irrigation of the lands of the company, 480 acres situate upon Orchard Mesa in Grand Valley, Colorado; but is willing to recognize all vested rights which may be finally decreed to the Orchard Mesa Power Canal.

The water in question is diverted from Grand River through head gates and power canal constructed on the south side of the river, and not exceeding 10 second feet are actually used in the irrigation of lands, the remaining amount of the appropriation, in so far as used, being utilized in generating electrical power to pump the 10 second feet, or less, to the lands in question, the water used for power purposes being thereafter returned to the river. The diversion point of the power canal is below the point of the government appropriation and the proposed head works and high line canal of the United States, in the Grand Valley project. The Reclamation Service reports that the canal of the power company is the last on the river in Grand Valley and that there is no irrigable land in the State of Colorado below that point upon which the waters of the river can be used for irrigation.

It is not proposed by the United States to divert or use in the irrigation of lands in the Grand Valley project any portion of the water which the Orchard Mesa company is applying to beneficial use; nor will the appropriation, as proposed by the United States, so reduce the flow of Grand River as to remove from the bed thereof the 250 second feet claimed by the company. Petitioners, however, insist that in order to preserve *in statu quo* the power canal and intake of the company so that the water appropriated by it will continue to pass through the head gates and power canal, approximately 1200 second feet of the water of Grand River must be permitted to pass the power company's head gates, which can not be the case if the Grand Valley reclamation project diverts and uses for the irrigation of arid lands on the north side of Grand River the amount of water claimed

for and on behalf of the project. Petitioners' contention is concisely stated in the concluding words of the argument, as follows:

What we must insist upon is a continuance of the natural flow of the river, not of any specific amount of water but a flow of the river, so that our appropriation, made twenty-three years ago, may be just as available to us in the future as it has been in the past.

There are statements in the brief as to proposed use of the waters of Grand River for development of power in connection with the Grand Valley reclamation project which are evidently based upon plans heretofore tentatively considered by the United States but now abandoned, and to this extent discussion of the arguments advanced is unnecessary further than to state that under the plan at present proposed the United States will utilize about 550 second feet of the water of Grand River for irrigation and will return all water used by it for power purposes to the river above the head gate of the Orchard Mesa Power Canal.

The contention of petitioners that the Orchard Mesa company is entitled to have the flow of the river maintained in the same manner as it existed at date of the company's original appropriation, might, during a portion of the irrigation season, at least, be interfered with or defeated by the diversion of 550 second feet above described. It is inconceivable that an individual or an association owning but 480 acres of irrigable lands should be legally entitled to so monopolize the waters of a stream as to prevent the diversion of water for the irrigation of more than 50,000 acres of arid irrigable lands in the same valley, merely because the individual or association first mentioned has a prior right to sufficient water for the irrigation of his or its lands. As above indicated, the plans of the United States do not contemplate, nor is it proposed, to remove from Grand River the water actually appropriated and applied to beneficial use by the power company. As to the remaining flow of Grand River, however, the company has and claims no appropriation nor does it make any use thereof.

The claim that the company is entitled to have maintained in the river the same natural flow there existing in 1889 and 1898, would seem to be based upon the common law doctrine of riparian rights. That this doctrine does not apply to waters in the State of Colorado is conclusively established by sections 5 and 6 of article XVI of the constitution of the State:

SEC. 5. WATER—PUBLIC PROPERTY. The water of every natural stream not heretofore appropriated within the State of Colorado is hereby declared to be the property of the public and the same is dedicated to the use of the people of the State subject to appropriation as hereinafter provided.

SEC. 6. DIVERTING UNAPPROPRIATED WATER—PRIORITY. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose.

It is stated in petitioners' brief that the question here involved has never been directly considered by the courts of the State of Colorado, and I have been unable to find any such adjudication. There are a number of cases, however, some of which are referred to in the brief, which affirm the doctrine of superiority of right by priority of appropriation. In this respect the provisions of the constitution and laws of the State of Colorado are similar to those of the State of Idaho, and a case arising in the latter State has been made the subject of consideration and decision by the Supreme Court of the United States during the present year, *Schodde, Executrix of Schodde v. Twin Falls Land and Water Co.*, 224 U. S., 107. It is contended by counsel for petitioners that this case is not analogous to, and does not control, the case at bar.

Schodde was the owner of 429.96 acres on the banks of Snake River. Through appropriations made in 1889 and 1895 there was appropriated from the Snake River water for the irrigation of his lands. The lands being too high for gravity irrigation, water wheels were erected to lift the water to a sufficient height for distribution and wing dams constructed in the river adjacent to the lands for the purpose of raising the water to such height that the current would drive the wheels and elevate the water. In 1905 the Twin Falls company constructed a dam below the lands in question, which had the effect of raising the water of the river to such a height as to destroy the current by means of which Schodde's water wheels were driven. Proceedings were instituted, claiming damages in the aggregate sum of \$56,650, and the case considered in concurring decisions of the United States Circuit Court, the United States Circuit Court of Appeals, and the Supreme Court of the United States. In illustrating the subject the Circuit Court said:

Suppose from a stream of 1,000 inches a party diverts and uses 100, and in some way uses the other 900 to divert his 100, could it be said that he had made such a reasonable use of the 900 as to constitute an appropriation of it? Or, suppose that when the entire 1,000 inches are running, they so fill the channel that by a ditch he can draw off to his land his 100 inches, can he then object to those above him appropriating and using the other 900 inches, because it will so lower the stream that his ditch becomes useless? This would be such an unreasonable use of the 900 inches as will not be tolerated under the law of appropriation.

The Court of Appeals, in affirming the decree of the court below, did so for substantially the same reasons as those given by the trial court. The Supreme Court of the United States stated that, in its opinion, the decisions of the courts below "so clearly portray the

situation and correctly apply the law to that situation as resulting from the constitution and statutes of Idaho and the reiterated decisions of the court of last resort of that State, which are referred to in the margin, that we might place our decree of affirmance upon the reasons which controlled the courts below." The court, however, proceeded to further discuss the question of alleged riparian rights, concluding, in substance, that a riparian proprietor in Idaho can acquire a prior or superior right to the use of waters flowing by or through his land only by appropriation and diversion as might any other user of the water.

I am convinced that the principles announced by the courts in the Schodde case are applicable, and similar, to those involved in the case now before me, and that so long as sufficient water remains in Grand River to meet the appropriation and beneficial use thereunder of the Orchard Mesa Power Canal, petitioners can not lawfully or equitably complain of the diversion of other waters of the river through appropriation and beneficial use, even though such appropriation and diversion may so lower the level of the river as to necessitate the adoption by petitioners of other methods of transferring the water appropriated by them from the river bed to their lands.

The Department, therefore, concludes that no legal or equitable right of the Orchard Mesa Power Canal Company is invaded by the present or contemplated plans of the United States in connection with the Grand Valley reclamation project.

HARRY LODE MINING CLAIM.

Decided December 12, 1912.

MINING CLAIM—VEIN OR LODE.

A mineral deposit in vein or lode formation—in place in the general mass of the mountain—whether the mineral it bears be metallic or nonmetallic, is subject to disposition only under the provisions of the lode mining laws.

VEIN OR LODE OF PHOSPHATE ROCK.

A deposit of phosphate rock confined between well-defined boundaries constitutes a vein or lode of mineral-bearing rock in place and is subject to disposition only under the provisions of the lode mining laws.

ADAMS, *First Assistant Secretary*:

The Department is in receipt of your letter of February 19, 1912, submitting for instructions, pursuant to departmental order of June 30, 1910, the matter of mineral entry 01635, made August 31, 1909, for the Harry lode mining claim, situate in the E. $\frac{1}{2}$, Sec. 7, W. $\frac{1}{2}$, Sec. 8, T. 11 N., R. 8 E., S. L. B. M., Salt Lake City, Utah.

This claim was located October 31, 1907, by M. S. Duffield *et al.*, the present entrymen, on account of a deposit of rock phosphate disclosed therein. Subsequently to such location and on December 9, 1908, the township wherein the claim is situated was, by departmental order of that date, withdrawn from all forms of location and disposal, subject, however, to valid existing rights. By executive order of July 1, 1910, the said departmental order of withdrawal was, in so far as it included lands described in said executive order—

ratified, confirmed, and continued in full force and effect; and subject to all of the provisions, limitations, exceptions and conditions contained in the act of Congress entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910, there is hereby withdrawn from settlement, location, sale, or entry and reserved for classification and in aid of legislation affecting the use and disposal of the phosphate lands belonging to the United States, all those certain lands of the United States set forth and particularly described as follows, to wit:

* * * * * *

T. 11 N., R. 8 E., Secs. 4 to 9 and 16 to 21, inclusive; Secs. 30 and 31.

You report that:

The application proceedings appear to be regular in all respects, the only question in the case being as to the patentability of the land; and, if patentable, whether as a *lode* claim as applied for and entered, or under the laws pertaining to *placer* mining claims.

In the case of Henderson *et al. v. Fulton* (35 L. D., 652, 662), it is said:

It may well be further stated, as a proposition equally supported by the authorities, that the amount of land which may be located as a vein or lode claim and the amount which may be located as a placer claim, and the price per acre required to be paid to the Government in the two cases when patents are obtained, and the rights conferred by the respective locations and patents, and the conditions upon which such rights are held, differ so materially as to make the question whether mineral lands claimed in any given case belong to one class or to the other, a matter of importance both to the Government and to the mining claimant. And, it is also true, mineral lands of either class can not be lawfully located and patented except under the provisions of the statute applicable to such class. Veins or lodes may be located and patented only under the law applicable to veins or lodes. Deposits other than veins or lodes are subject to location and patent only under the law applicable to placer claims.

And at page 655 of the same decision, it is said:

It is also apparent that Congress had in mind and fully recognized, what experience had theretofore abundantly shown, that these two classes of mineral deposits are so different in their character and formation, and so completely separate and distinct from each other, that even when found to exist in the same superficial area, they may be located and held by different persons, and patented accordingly (Sec. 2333). This principle has been recognized and followed in both judicial and departmental decisions (*Reynolds v. Iron Silver*

Mining Company, 116 U. S., 687, 695-7; Aurora Lode *v.* Bulger Hill and Nugget Gulch Placer, 23 L. D., 95, 99-100; Daphne Lode Claim, 32 L. D., 513; Jaw Bone Lode *v.* Damon Placer, 34 L. D., 72).

To the same effect also is the decision in *E. M. Palmer* (38 L. D., 294). See also *Clipper Mining Company v. Eli Mining and Land Company* (194 U. S., 220, 228) and *Webb v. American Asphaltum Mining Company* (157 Fed. Rep., 203, 206).

If, therefore, the deposit, on account of which title to the claim here in question is sought, exists therein in vein or lode formation, the area would be disposable only under the provisions of the lode mining laws. If, on the other hand, it be a placer deposit and there be no lode within the limits of the claim, the lode laws would have no application, but the land would be subject to entry and patent exclusively under the provisions of the placer mining laws.

The claim is situated in the northern part of what is known as the Crawford Mountain area. The record in this particular case does not present such a description of the deposit as would enable the Department to intelligently determine its precise character. The claim, however, is shown to adjoin, on its northerly end, the southerly end of the patented Lorine lode mining claim, and to be laid along a southerly extension of the outcrop of the same deposit, which, in a report filed in connection with the Lorine patent proceeding, was described by the mineral surveyor, who surveyed the latter claim. This description, which is deemed by the Department to sufficiently establish the character of the deposit disclosed on this claim, is as follows:

The said deposit consists of a series of bedded veins of rock containing varying proportions of Calcic Phosphate. The individual veins of the series of veins vary in thickness from a few inches to ten or twelve feet. Only a portion of the veins contain rock sufficiently rich in Calcic Phosphate to be of commercial value, and only a portion of the veins are thick enough to be profitably mined, even when the contained proportion of Calcic Phosphate is sufficiently high. . . . Physically, the higher grade vein rock occurring in the veins of the Lorine lode location is hard, its color is a grayish, bluish black. It is homogeneous in appearance, and is composed of small oolitic rounded grains cemented together by an extremely thin film of Calcite and Silica. . . . Taken as a whole, the above mentioned series of bedded veins of Phosphate Rock and also each of the individual or separate veins of the series lies between, is conformable to, and is bounded by walls of rock, which wall rock is generally limestone, but often is a very silicious or cherty limestone, or a soft sand stone, or a shale or quartzite.

Here follows a sectional description of the phosphate beds disclosed in the tunnel on the claim:

From the position of the hanging wall of the series of veins as exposed in the Lorine Tunnel, the indications on the surface along the Apex of the veins and the prominently outcropping foot wall formation west of the mouth of the Lorine Tunnel, I estimate the thickness of the series of veins, taken as a whole,

from the contact of the eastern most vein of the series of veins with its hanging wall, to the contact of the western most vein of the series with its foot wall, to be approximately 110 ft.

* * * * *

As shown in the above description, the individual veins of the series of veins of Phosphate Rock which exist in the Lorine lode location, are separated from each other by strata of limestone, chert or shale. These separating strata vary in thickness from less than an inch to several feet. Taken as a whole, the series of veins lies between and is clearly limited and defined in extent and position by solid massive walls of hard silicious, limestone. Within the series of veins the separating strata limit and define the extent and position of the corresponding individual veins of the series and are the walls of these individual veins. The strike and dip of the veins and walls conform to each other throughout their entire extent within the Lorine lode location. I thus find that taken separately or as a series, that is, as a whole, the veins are obviously in place between walls, have a well defined dip, and strike and are an essential part of the mountain upon which the Lorine lode location is located.

This and co-related deposits in Bear Lake County, Idaho; Uintah County, Wyoming, and Rich, Weber, and Morgan Counties, Utah, were in 1909 examined by Messrs. Hoyt S. Gale and Ralph W. Richards, geologists of the United States Geological Survey, the results of which examination are given in Bulletin No. 430. As described by those gentlemen, the formations and the phosphate-bearing member thereof do not differ in any substantial particular from the formations and deposit existing upon the Lorine claim described by the mineral surveyor thereof.

Sections 2320 to 2328 of the Revised Statutes make certain provisions for the locating, working, holding and purchase of mining claims "upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits." Sections 2329 to 2331 provide that claims usually called "placers," including all forms of deposit excepting veins of quartz, or other rock in place, shall be subject to entry and patent under like circumstances and conditions and upon similar proceedings, as are provided for vein or lode claims, but with wholly different provisions as to extra-lateral rights, area, survey, and price to be paid for the land.

If, therefore, the deposit here in question, which undoubtedly contains a valuable mineral substance, answers the description of a vein or lode of quartz or other rock in place, it is subject to disposition exclusively under the provisions of the lode land law. If not, then the placer laws alone are operative.

In the case of *Iron Silver Mining Company v. Cheesman* (116 U. S., 529), the Supreme Court, page 533, said:

What constitutes a lode or vein of mineral matter has been no easy thing to define. In this court no clear definition has been given. On the Circuit it has often been attempted. Mr. Justice Field, in the *Eureka* case (4 Sawyer, 302,

311), shows that the word is not always used in the same sense by scientific works on geology and mineralogy and by those engaged in the actual working of mines.

After setting forth the court's definition in the Eureka case, the court says:

This definition has received repeated commendation in other cases, especially in *Stevens v. Williams* (1 McCrary 480, 488), where a shorter definition by Judge Hallett of the Colorado Circuit Court, is also approved, to wit: "In general, it may be said, that a lode or vein is a body of mineral or mineral body of rock, within defined boundaries, in the general mass of the mountain."

In *Hayes et al. v. Lavagnino* (53 Pac., 1029), it is held (syllabus) that:

In practical mining, the terms "vein" and "lode" apply to all deposits of mineralized matter within any zone or belt of mineralized rock separated from the neighboring rock by well-defined boundaries, and the discoverer of such a deposit may locate it as a vein or lode. In this sense, these terms were employed in the several acts of Congress relating to mining location.

In *Beals v. Cone* (62 Pac., 948, 953), it is said:

The controlling characteristic of a vein is a continuous body of mineral-bearing rock in place, in the general mass of the surrounding formation. If it possess these requisites and carry mineral in appreciable quantities, it is a mineral bearing vein within the meaning of the law, even though its boundaries may not have been ascertained.

In the case of the *United States Mining Company v. Lawson* (134 Fed. Rep., 769), which was affirmed by the Supreme Court (207 U. S., 1), it was held that a broken, altered, and mineralized zone of limestone, lying between walls of quartzite, constituted a lode or vein within the meaning of the mining laws.

In *Duggan v. Davey* (26 N. W., 887), a deposit of mineralized quartzite, a formation of purely sedimentary origin, about ten feet in thickness, inclosed between a stratum of limestone and a separate and distinct bed of quartzite, and having a dip of about 8°, was regarded by the court as a lode or vein within the meaning of the mining laws.

In the case of *E. M. Palmer, supra*, the Department had before it for determination the question as to whether a deposit of sandstone shown to carry gold, which had been located under the placer mining laws, was a lode or placer formation. The Department, in that case, at page 297, said:

From the reasoning of the authorities cited, it follows that sand-rock or sedimentary sandstone formation in the general mass of the mountain bearing gold, such as is here disclosed by the evidence, is rock in place bearing mineral and constitutes a vein or lode, within the purview of the statute, and can be located and entered only under the law applicable to lode deposits. The Department is convinced that the deposit described in the testimony in this case falls well within the category of lode deposits under the mining statutes, and that such a deposit can not lawfully be appropriated or patented under those portions of the statutes which apply to placer claims.

The mineral-bearing sedimentary deposits, held in the cases above cited to be lodes or veins within the meaning of the mining laws, were valuable on account of the metallic minerals therein contained. In *Webb v. American Asphaltum Mining Company*, *supra*, decided in 1907, it was, however, held in substance, that the clause "other valuable deposits," used in section 2320, Revised Statutes, includes nonmetalliferous as well as metalliferous deposits, and hence that a deposit of asphaltum in lodes or veins in rock in place may be entered and patented under section 2320, and may not be secured by means of placer claims under section 2329, nor the act of February 11, 1897 (29 Stat., 526), regarding the entry of lands containing petroleum and other mineral oils. Citing and following this decision, the Department, in the case of *Utah Onyx Development Company* (38 L. D., 504), held that valuable deposits of onyx occurring in well-defined fissures, with clearly marked hanging and foot walls of limestone, are subject to appropriation only under the lode mining laws.

In the earlier case of *Henderson et al. v. Fulton*, *supra*, the Department said, at page 663:

Some of the authorities hold the view that only minerals of the metallic class are within the statutes relating to veins or lodes, but the great weight of authority is the other way; and the Department is of opinion that the latter is the better view. That the statute is broad enough to embrace minerals of the nonmetallic as well as the metallic class, wherever found in rock in place, was distinctly held after careful consideration and full discussion in the case of *Pacific Coast Marble Company v. Northern Pacific Railroad Company* (25 L. D., 233, 241, 243). See also *Lindley on Mines*, Secs. 86, 323; 1 *Snyder on Mines*, Sec. 337.

It is immaterial, therefore, whether a deposit bear minerals of a metallic or nonmetallic nature; if a mineral deposit exist in vein or lode formation—that is to say, if it be in place in the general mass of the mountain—it is, whether the mineral it bears be metallic or non-metallic, subject to disposition only under the provisions of the lode mining laws.

From the foregoing, it is clear to the Department that a deposit of phosphate rock, such as that herein-above described, confined, as it is shown to be, between well defined boundaries, constitutes a lode or vein of mineral-bearing rock in place within the general mass of the mountain, and hence is subject to disposition only under the provisions of the lode mining laws.

This location, so far as the record discloses, was made in entire good faith, and there is no suggestion of anything that might in any wise invalidate the claim, the location, and, in fact, the entry, having been made before the executive withdrawal of July 1, 1910.

In the absence of other objection, therefore, the claim will be passed to patent as located and entered.

JONAS R. NANNESTAD.*Decided December 9, 1912.***TIMBER AND STONE ENTRY—EXAMINATION OF LAND BY APPLICANT.**

Where a timber-and-stone applicant examined the land applied for within thirty days prior to the filing of his application, a showing of further examination by the applicant is not required.

LAYLIN, Assistant Secretary:

Jonas R. Nannestad has appealed from decision of March 12, 1912, by the Commissioner of the General Land Office, requiring him to furnish an affidavit showing that he examined the land embraced in his entry under the timber and stone act, within thirty days prior to final proof, or that he has since examined it, and showing the character and condition of the land on the date of such examination.

The land involved is lot 10, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 6, T. 68 N., R. 17 W., and the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 1, T. 68 N., R. 18 W., Duluth, Minnesota, land district. The entryman filed his application and sworn statement on June 4, 1910, wherein he estimated the value of the land alone at \$80, and the timber thereon as worth \$320, making a total value for the land and timber of \$400. Under date of April 27, 1911, the Chief of Field Division returned the application to the local office without appraisalment. Accordingly, the applicant proceeded to offer final proof, as provided in section 19 of the revised timber and stone regulations of August 22, 1911 (40 L. D., 238), and paid the estimated value, \$400.

Section 11 of the said regulations requires such an applicant to show that he examined the land not more than 30 days before the date of his application. In this case it is shown that the claimant examined the land on June 2, 1910, which was only two days prior to the date of his application. One of his final proof witnesses examined the land June 2, 1910, with the claimant, and again on June 20, 1911, alone. The other proof witness examined the land July 9, 1911. The proof was submitted July 18, 1911. Therefore the land was examined by the two witnesses to the proof within thirty days prior to final proof, and by the entryman, himself, within thirty days prior to his application. It appears that the entryman has fully complied with the said regulations, and no further examination of the land by the entryman is deemed necessary. The Commissioner's requirement would compel all claimants in such cases to make two examinations of the land where proof has been deferred for nine months, in order to afford the Government an opportunity to make appraisalment. This would be an undue burden, and it is not required by the regulations.

The decision appealed from is accordingly reversed, and in the absence of other objection, the proof will be accepted.

PRACTICE—REHEARING—TIME FOR FILING—RULE 83.**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,
Washington, December 9, 1912.

REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: It seems to have been the rule of administration in disposing of motions for rehearing of departmental decisions to extend the period allowed for their filing by Rule 83 of Practice for ten days in instances where neither party is represented by counsel having offices in the city of Washington, so that in such instances motions have been considered if filed within forty days after service of notice of the departmental decision.

There is no warrant for such action under the Rules of Practice, and you are advised that motions for rehearing must be filed within thirty days after notice of departmental decision. Any such motion must be filed with the Secretary of the Interior within the time allowed, and not in the local office.

SAMUEL ADAMS,
First Assistant Secretary.

ROBERT BEVERIDGE.

Decided December 16, 1912.

CONTESTANT—PREFERENCE RIGHT—INTERVENING CLAIM.

Where a successful contestant within the preference right period filed a soldiers' additional application, and after the expiration of that period filed a homestead application in attempted substitution for, and waived all claim under, the soldiers' additional application, he acquired no right under his homestead application so filed as against an adverse homestead application filed after cancellation of the entry and held suspended pending exercise by contestant of his preference right.

ADAMS, *First Assistant Secretary:*

Robert Beveridge has filed a motion for rehearing of departmental decision, dated October 16, 1912, rejecting his homestead application for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 24, T. 130 N., R. 70 W., 5th P. M., Bismarck, North Dakota, land district.

The material facts in this case are as follows:

On January 14, 1907, the Commissioner of the General Land Office canceled the entry of one Gobel, which included the above described tract, as the result of a contest prosecuted by Beveridge.

On February 6, 1907, one Harrison filed his homestead application for said land, which was suspended pending the exercise by Beveridge of his preference right, under the act of May 14, 1880 (21 Stat., 140).

On February 7, 1907, Beveridge was formally notified by the local officers of his preference right of entry and, on February 19, 1907, he filed his application for said land, under section 2306, Revised Statutes, as the assignee of one Hoadley.

On May 27, 1909, Beveridge filed his homestead application for said land, which the local officers suspended to await disposition of the soldiers' additional application then pending before the General Land Office. On the following day, Beveridge filed a waiver of all rights under the soldiers' additional application.

On October 14, 1909, the Commissioner of the General Land Office finally rejected the soldiers' additional application of Beveridge and, on October 18, 1909, the local officers allowed Harrison's entry upon the application filed on February 6, 1907, and rejected Beveridge's application of May 27, 1909.

The General Land Office affirmed the action of the local officers, and the Department, in its said decision of October 16, 1912, held that Harrison's right to the land attached upon the withdrawal by Beveridge, of the soldiers' additional application, and that Beveridge's homestead application, filed on May 27, 1909, was properly rejected.

The bare statement of the facts in this case would seem to demonstrate, beyond possibility of doubt, that there was no error in the decision of October 16, 1912. Counsel for Beveridge has, however, filed an elaborate argument in support of the pending motion, in which it is urged that said decision ignores Beveridge's statutory preference right to enter the land.

Counsel errs in assuming that, because the act of May 14, 1880, *supra*, allows a successful contestant, for thirty days from notice, the preference right to enter the land, the local officers should be required to allow and pass to entry any application, regular on its face, that he may file; in short, that he should be excepted from the force and effect of the regulations that require all applications, founded upon an uncertified or undetermined right or base, to be submitted to and found sufficient by the General Land Office, before entry is allowed thereon.

The preference right of entry conferred by law upon successful contestants does not add to their qualifications to make entry. If, for example, one has exhausted his homestead right, the preference right will not restore his qualifications as a homesteader, nor will it confer validity upon a baseless claim, under section 2306, Revised Statutes. Obviously, therefore, he earns by his contest no more than the right to make entry within thirty days from notice, notwithstanding intervening applications, if he be qualified to make the entry applied for. If, through error of judgment, he asserts a claim which can not, under the regulations, pass to entry within the thirty days, and the claim is found to be illegal, there is and should

be in the Department no power to permit the rectification of the mistake to the prejudice of other applicants. The act of May 14, 1880, *supra*, manifestly contemplates the withholding of the land from disposition for thirty days only pending the exercise of the preference right. To accede to the proposition, that a successful contestant may segregate a tract from disposition for years while he tests the validity of alleged rights or awaits legislation restoring lost rights, would undoubtedly result in grave abuses.

The filing of any lawful application for public land in a local office fixes the right of the applicant; and the delay necessary, under the regulations, in soldiers' additional right cases, will not affect the status of one who files a valid soldiers' additional application, in the exercise of the preference right won by contest. The entry, when allowed, relates back to the date of the application and effectually bars all intervening claims. It is only when a fraudulent or otherwise invalid application is filed, in an attempted exercise of a preference right, that complications arise, as in this case. There is no warrant, in the act of May 14, 1880, *supra*, for holding that a contestant can increase the preference right period or suspend the running of time against himself by filing applications not founded upon a legal right or claim. Nor can it be doubted since the act confers upon him, not an exclusive but a mere preferential right of entry, that it recognizes the right of entry in others, to which his own right is superior. That action upon intervening applications be suspended until his own application is determined is, therefore, all that a successful contestant can claim.

The motion for rehearing and the request therein made for an oral argument are, accordingly, denied.

MERTIE C. TRAGANZA.

Petition for rehearing of departmental decision of November 17, 1911, 40 L. D., 300, denied by First Assistant Secretary Adams, December 17, 1912.

PRACTICE—CONTEST AGAINST FINAL ENTRY.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, December 18, 1912.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Under the Rules of Practice it is possible for an individual to lodge a contest against a final entry, without previous consideration by your office. It is believed to be necessary, therefore, in order

to preserve fully the possible interests of the government in the premises, that when the local officers notify the chief of field division of the filing of any such contest, as the regulations require, he should, at once, have such investigation made as will enable him to determine whether the United States should intervene in the pending contest or institute an independent proceeding against the entry upon another charge.

Very respectfully,

LEWIS C. LAYLIN,
Assistant Secretary.

PEND D'OREILLE DEVELOPMENT COMPANY.

RIGHT OF WAY—POWER SITE—AUTHORITY TO CONSTRUCT DAM.

The authority to construct a dam across the Pend d'Oreille river conferred upon the Pend d'Oreille Development Company by the acts of February 25, 1907, and May 20, 1912, extends only to the jurisdictional interest of the United States in the navigable waters and does not dispose of any property rights of the government in the public lands; and the plans and specifications for construction of the dam submitted to the Secretary of War for approval, which indicate the use of lands of the United States within Kaniksu national forest and power-site reserve No. 72, should not be approved until permits for use of the lands shall have been secured from both the Secretary of Agriculture and the Secretary of the Interior under the act of February 15, 1901.

Secretary Fisher to the Secretary of War, December 19, 1912.

I have received, by your reference of October 29 indorsed thereon, sundry papers including the plans and specifications for a dam and other hydro-electric works submitted to you for approval under the act of May 20, 1912 (37 Stat., 115), extending the time for construction of a power dam in the Pend d'Oreille river, which was originally licensed by the act of February 25, 1907 (34 Stat., 931), and under the general dams act of June 23, 1910 (36 Stat., 593).

The papers were submitted to the Director of the Geological Survey, whose report of November 14 (copy inclosed) shows: That the company contemplates the development of 200,000 horsepower at this site; that the plans indicate use of lands of the United States on both sides of the Pend d'Oreille river at the "Z" canyon, those on the east side being a part of the Kaniksu national forest and those on the west bank being within power site reserve No. 72, created on the recommendation of this Department by executive order of July 2, 1910, under the withdrawal act of June 25, 1910 (36 Stat., 847), the same having been first reserved as temporary power site withdrawal No. 72 on November 27, 1909; that the field examinations by the engineers of the Geological Survey made in 1910 disclose the fact that this river probably contains the greatest power sites remaining in Government ownership, and that many mineral claims of doubtful

validity had been filed along the banks of the river, especially at points of greatest value for power development; that the deed from the Pend d'Oreille Development Company to the International Power and Manufacturing Company, included among the papers transmitted by you, shows that the latter company has purchased such mineral claims as have been located at the site proposed to be used by it, also all rights of the Pend d'Oreille Development Company under scrip selection No. 140 of the Northern Pacific Railway Company, Spokane 05301, which, in the opinion of the Director of the Geological Survey, hitherto duly communicated to the Commissioner of the General Land Office, should be canceled as invalid.

I am of opinion, as was intimated by departmental letter of October 14 to you, that the license given by the statutes above quoted affects only the jurisdictional interest of the United States in navigable waters and does not dispose of the property rights of the Government in the public lands. I therefore agree in the opinion expressed by the Director of the Geological Survey that the International Power and Manufacturing Company should, prior to construction, be required to secure permits from both the Secretary of Agriculture and the Secretary of the Interior under the act of February 15, 1901 (31 Stat., 790), and that the plans and specifications should not be approved by you until this shall have been done.

All the papers transmitted by you are herewith returned.

WINNINGHOFF v. RYAN.

Second petition for the exercise of the supervisory authority of the Secretary of the Interior to review departmental decision of January 2, 1912, 40 L. D., 342, denied by First Assistant Secretary Adams, December 20, 1912.

MERRITT J. GORDON.

Decided December 27, 1912.

REPAYMENT—ENTRY ERRONEOUSLY ALLOWED.

Where a homestead entry was allowed subject to the provisions of the act of June 22, 1910, contrary to the purpose of the applicant, who filed an ordinary homestead application with the intention to secure the land free from restriction, and the entryman, rather than take the land subject to the conditions imposed by that act, relinquished the entry, he is entitled to repayment of the fees and commissions paid by him in connection with the entry.

ADAMS, First Assistant Secretary:

Merritt J. Gordon has appealed from decision of January 18, 1912, by the Commissioner of the General Land Office, denying ap-

plication for repayment of fees and commissions paid by him in connection with his homestead entry for the NW. $\frac{1}{4}$, Sec. 14, T. 15 N., R. 6 E., Olympia, Washington, land district.

The tract entered was embraced in a withdrawal for coal classification by executive order of July 7, 1910, under authority of the act of June 25, 1910 (36 Stat., 847), and subject to the provisions of the act of June 22, 1910 (36 Stat., 583).

Gordon filed the ordinary homestead application blank, and he was allowed to make entry October 26, 1910. The local officers appear to have stamped upon the application at the time the notation that same was made in accordance with and subject to the provisions and reservations of the act of June 22, 1910, *supra*.

November 16, 1910, the local officers transmitted to the Commissioner an application by Gordon for classification of the land supported by affidavits purporting to show that the land did not contain any coal of commercial value. The local officers stated that Gordon made what he intended for a nonmineral homestead application for said land but which was inadvertently allowed by that office under the act of June 22, 1910; that, finding that the intention of the applicant was to dispute the coal character of the land, he was allowed thirty days within which to file an application for the classification of the land.

Thereafter, the Commissioner considered the application for classification, and rejected the same. Then the entryman filed the present application for repayment and relinquished his entry. The Commissioner correctly declined to order a hearing for the purpose of determining the question as to the coal character of the land, as the land had not been classified. The act of June 22, 1910, provides for such hearing only in cases where the lands have been classified by the Department.

It appears, however, that the entry was erroneously allowed by the local officers as under the act of June 22, 1910, as the entryman desired to enter the same free from the conditions imposed by that act. When he found that he could not have the land free from such conditions, he relinquished the entry. Under the circumstances, it is believed that the entry should be considered as having been erroneously allowed within the meaning of the act of June 16, 1880, which provides for repayment in cases where entires have been erroneously allowed and can not be confirmed. The fact that the local officers stamped upon the entryman's application a notation with reference to the act of June 22, 1910, should not be held to destroy the intentions of the entryman to make entry free from the conditions of that act.

Furthermore, when the Commissioner rejected the application for classification, he held the entry for "rejection" subject to the

right of the entryman to file his election to permit the entry to stand under the provisions of the act of June 22, 1910. The entryman acquiesced in that decision and relinquished his entry, therefore his entry had the status of a rejected entry considering its condition at the time of relinquishment and application for repayment. Hence the case comes within the provisions of section 1 of the act of March 26, 1908 (35 Stat., 48), concerning repayments. The repayment will, accordingly, be allowed.

The decision appealed from is reversed.

PARAGRAPH 18 OF COAL LAND REGULATIONS AMENDED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, December 30, 1912.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: March 18, 1912, in connection with a communication from Senator F. E. Warren, the Department called upon you for report as to the advisability of amending paragraph 18 of the coal-land regulations, particularly with reference to the disposition of purchase money tendered with coal-land applications under section 2347 of the Revised Statutes. Under date of March 26, 1912, you recommended against changing the regulations, your principal objection being that it will revert to the former practice under which large sums of money were held by the registers and receivers of the United States land offices in their unearned fee accounts, a practice undesirable both from the viewpoint of the public-land claimant and of the Department.

The Department does not desire to return to this practice, but is of opinion that the payment of the purchase price at time of filing the application to purchase should be optional only with the claimant, and that in cases where he does not desire to pay in the money with the application to purchase he should be permitted to defer the payment until after publication and posting of notice have been completed and the proofs submitted examined by the register and receiver and found regular.

With respect to the price to be paid for the coal land under such an application, the applicants will be required to pay the price fixed and existent at date he makes payment, and consequently, the applicant who does not pay the purchase price at time of his application to purchase may be required, because of reclassification or revaluation, to pay a higher price when he completes the transaction by payment after acceptance of his final proof. To accomplish the change

in practice herein outlined, section 18 of the coal-land regulations approved April 12, 1907 (35 L. D., 671), has this day been amended. Draft of amended regulation is herewith inclosed. [See below.]

You will promptly give notice hereof to registers and receivers, advising them that the requirements of amended paragraph 18 will be applicable to all applications to purchase offered or filed on or after February 1, 1913.

Respectfully,

SAMUEL ADAMS,
First Assistant Secretary.

PARAGRAPH 18 OF COAL LAND REGULATIONS AMENDED.

REGULATIONS.¹

18. After the thirty days' period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement (including an attached copy of the published notice) that the notice was published for the required period, giving the first and last date of such publication, and his own affidavit, or that of some credible person having personal knowledge of the fact, showing that the notice aforesaid remained conspicuously posted upon the land sought to be patented during said thirty days' publication, giving the dates. The register shall certify to the fact that the notice was posted in his office for the full period of thirty days, the certificate to state distinctly when such posting was done and how long continued, giving the dates.

The claimant will be required within 30 days after the expiration of the period of newspaper publication to furnish the proofs specified in this paragraph, whereupon, and after receipt of report of chief of field division, as required in paragraphs five and six of circular approved April 24, 1907, the register and receiver will examine the proofs submitted, and if all be found regular and the application allowable, will, by registered mail or personal service, so notify the applicant in writing, requiring him, within *fifteen* (15) days from receipt of notice of such allowance, to make payment of the purchase money unless it has theretofore been made. Should the specified proofs and purchase money be not furnished and tendered within the time prescribed, the local officers will reject the application subject to appeal. In the exercise of a preference right of purchase, the publication and posting of notice should be completed and the proof thereof filed within the year fixed by the statute.

Applicants to purchase under section 2347 of the Revised Statutes may at their option pay for the land at the time of filing their appli-

¹ See page 416.

cations to purchase, or at any time thereafter, up to fifteen days from and after receipt of notice from the register and receiver, as hereinbefore provided. The price to be paid will be that existent at date of actual payment of the purchase money by the applicants to the register and receiver, and a subsequent increase in the price will not affect their right to complete the applications, if proceedings be diligently prosecuted to final proof and entry. Where payments are not made at time of filing applications to purchase, but are deferred to a later date, and an increase in valuation has occurred subsequent to application to purchase, but before the actual tender and payment of the purchase money, the applicants will in all such cases be required to pay the new or higher price.

The foregoing is not applicable to coal-land claimants who have initiated claims under section 2348 of the Revised Statutes by the opening and improving of a mine of coal on public land and who have diligently prosecuted their claims to completion as required by the law and regulations. Such claimants will be required to pay the price fixed and existent at the time of the initiation of their claims.

Approved, December 30, 1912:

WALTER L. FISHER,
Secretary.

MACKAY v. NORTHERN PACIFIC RY. CO.

Decided July 16, 1912.

ENLARGED HOMESTEAD ENTRY—QUALIFICATIONS OF ENTRYMAN—ACT OF AUGUST 30, 1890.

The provision in the act of August 30, 1890, limiting the amount of land that may be acquired by one person under the agricultural public-land laws to 320 acres, does not prevent one who has acquired title to 160 acres under the desert-land law, and who is entitled to make homestead entry for 160 acres under the general provisions of the homestead law, from making entry and acquiring title to 320 acres under the enlarged homestead act of February 19, 1909.

ADAMS, *First Assistant Secretary*:

The Northern Pacific Railway Company appealed from decision of the Commissioner of the General Land Office of August 16, 1911, canceling its indemnity selection for SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, T. 5 N., R. 57 E., M. P. M., and allowing Dan C. Mackay's homestead application for that and other land, Miles City, Montana.

March 8, 1910, when the township plat of survey was filed in the local office, the railway company filed its indemnity list for the above-described land. March 9, 1910, Mackay filed in the local office a homestead application to enter such land, together with the S. $\frac{1}{2}$ NE. $\frac{1}{4}$,

NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, and lot 2, Sec. 2, in said township. May 1, 1909, the township was designated under the enlarged homestead act of February 19, 1909 (35 Stat., 639). The land in Mackay's application was included in coal land withdrawal, Montana, No. 1, executive order, July 9, 1910, and was restored to entry by executive order March 31, 1911, and classified as coal land at twenty dollars per acre. Mackay filed corroborated affidavit alleging settlement in 1891. August 6, 1910, contest notice issued for hearing September 14, 1910, at the local office, which was duly served August 11, 1910. On the day set for hearing contestant appeared in person, aided by counsel, and contestee failed to appear. Evidence was taken, and March 11, 1911, the local office found for contestant. The railway company appealed and the Commissioner affirmed the action of the local office.

The evidence disclosed that Mackay had made a desert-land entry and received title for one hundred and sixty acres.

Mackay's improvements on this land consisted of fencing enclosing all of it, a log dwelling-house, barns, sheds, sheep shed, a dug well, a dam, ditches, and laterals; that he had lived on, used, occupied, and cultivated all of the land, making it his homestead ever since his settlement, and his improvements have cost about \$20,000, and are worth at the present time \$12,000.

The assignments of error and contentions of the railway company are that the act of August 30, 1890 (26 Stat., 391), limits the amount of land that can be acquired by one person under the agricultural land laws to three hundred and twenty acres, and that this act is not repealed or modified by that of February 19, 1909, *supra*, and allowance of Mackay's entry for the full three hundred and twenty acres is a violation of the act of August 30, 1890.

The act of February 19, 1909, provides:

That any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivisions, under the provisions of this act, in the States of . . . Montana, . . . three hundred and twenty acres, or less, of nonmineral, nonirrigable, unreserved and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body, and not over one and one-half miles in extreme length: *Provided*, That no lands shall be subject to entry under the provisions of this act until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply.

The evident purpose of this act was to enlarge the right of homestead entry as to certain lands from one hundred and sixty acres to three hundred and twenty acres. In consideration of the irreclaimable arid character of land to be designated under this act, three hundred and twenty acres were considered no more than the equivalent of one hundred and sixty acres of irrigable land, or nondesert land.

It was a specific enlargement of the homestead right as to this character of land, allowing entry of a double quantity of inferior land.

When a right of entry has been specifically enlarged, as that of homestead has by the act of February 19, 1909, the act of August 30, 1890, is necessarily modified to the extent of such enlargement. Mackay, not having had the benefit of the homestead law and having acquired but one hundred and sixty acres under the agricultural land laws previous to his application in question, was "a qualified entryman under the homestead laws," and to every such person the statute of 1909, as to this character of land, made the homestead right three hundred and twenty, and nothing in the act of August 30, 1890, will prevent enjoyment of the privilege granted by the later act of 1909.

The decision is affirmed.

MACKAY v. NORTHERN PACIFIC RY. CO.

Motion for rehearing of departmental decision of June 16, 1912, 41 L. D., 418, denied by First Assistant Secretary Adams, January 17, 1913.

GOODALE v. MORRIS.

Decided September 14, 1912.

SECOND HOMESTEAD ENTRY—ACT OF FEBRUARY 3, 1911.

The term "filing fees" as used in the act of February 3, 1911, includes any moneys required by law to be paid at the time of the making of a homestead entry; and an entryman of former Indian lands who relinquished his entry for an amount not exceeding the fees and commissions and the installment of the purchase price paid by him at the time of making the entry, is within the purview of that act.

ADAMS, *First Assistant Secretary*:

November 7, 1911, the Commissioner of the General Land Office affirmed the action of the register and receiver in rejecting the contest affidavit filed by Fred C. Goodale against the homestead entry of Joseph D. Morris for the SW. $\frac{1}{4}$, Sec. 29, T. 16 N., R. 22 E., Timberlake, South Dakota, land district, for the stated reason that Goodale is disqualified to make homestead entry for the lands by reason of having sold his relinquishment of a former homestead entry for a sum in excess of the "filing fees" on said entry.

It appears from Goodale's affidavit that he relinquished the former entry for the sum of \$94; that he had paid at time of entry \$14 fees and commissions and \$80 as a part of the purchase money exacted by law, the lands being a part of a former Indian reservation opened to homestead entry at a purchase price of \$2.50 per acre, payable in

installments. Goodale's contest affidavit states a sufficient cause of action against the homestead entry of Morris and, as above indicated, the action of the register and receiver and of the Commissioner of the General Land Office is based solely upon his qualifications as a homestead entryman.

The act of Congress approved February 3, 1911 (36 Stat., 896), allowing second homestead and desert-land entries to those who for any cause have lost or abandoned their former entries, provides that the provisions of the law shall not apply—

to any person whose former entry was canceled for fraud, or who relinquished his former entry for a valuable consideration in excess of the filing fees paid by him on his original entry.

The evident intent and purpose of this provision was to deny the right of second entry to those persons who had been guilty of fraud in connection with their original entries or who had disposed of their relinquishments of such entries at a profit. The securing through sale of relinquishment the return of the amount paid in fees was not regarded as undesirable or a sufficient reason for denying the right of second entry. In this particular instance the laws applicable require, in addition to the \$14 fees and commission, the payment of an installment of purchase money for the benefit of the Indians, the former owners of the land. It, like fees and commissions, was an amount required to be paid at time of entry, and such a payment occupies, in spirit at least, so far as the entryman is concerned, the same status as the money paid for fees and commissions. His relinquishment for the exact sums so paid constitutes no violation of the law, nor does it, in the opinion of the Department, debar him from the right to a second homestead entry under the provisions of the act of February 3, 1911. On the contrary, his case falls clearly within the spirit and intent of said act and the Department construes the term "filing fees," as used in said act, as broad enough to comprehend and include any moneys required by law to be paid at time of the making of a homestead entry.

The Commissioner's decision is reversed, and the case remanded with instructions to permit Goodale's contest to proceed.

ROBERT C. NEWLON ET AL.

Decided September 14, 1912.

ASSIGNMENT OF RECLAMATION HOMESTEADS—ACT OF JUNE 23, 1910.

Assignments of homestead entries within reclamation projects under the act of June 23, 1910, may be made only to persons qualified to make entry under the general homestead laws, and subject to the limitations, charges, terms, and conditions of the reclamation act.

QUALIFICATION OF WIFE OF ENTRYMAN TO TAKE ASSIGNMENT.

The reclamation act contemplates that one family shall acquire only one farm unit thereunder; and where an entry within a reclamation project is conformed to farm units, the wife of the entryman is not qualified to take an assignment under the act of June 23, 1910, of a portion of her husband's entry excluded from the farm unit retained by him.

ASSIGNMENT OF LEGAL SUBDIVISION AFTER MERGER IN FARM UNIT.

Where, in conforming a homestead entry within a reclamation project to farm units, a legal subdivision thereof, not retained by the entryman, is, with other vacant land, embraced in a farm unit, the entryman can not thereafter, under the provisions of the act of June 23, 1910, assign such tract as a legal subdivision, for the reason that the legal subdivision, as such, no longer exists, having been merged in the farm unit; nor can he make assignment under that act of the farm unit into which such legal subdivision has been merged, for the reason that the farm unit includes land not embraced in his original entry.

ADAMS, *First Assistant Secretary:*

On April 6, 1905, Robert C. Newlon made homestead entry for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and lot 1, Sec. 17, T. 150 N., R. 104 W., 5th P. M., Williston, North Dakota, land district, Lower Yellowstone irrigation project, containing 158.10 acres, subject to the provisions of the reclamation act of June 17, 1902 (32 Stat., 388).

On February 11, 1911, the Department approved the preliminary farm unit plat of said township upon which the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said section 17 was designated as farm unit "D" and the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and lots 1 and 2 of said section 17, lot 1, section 20, and lot 2, Sec. 21, containing 118.22 acres, were designated as farm unit "E."

On May 29, 1911, the local officers reported to the Commissioner of the General Land Office that the entryman had been notified, by registered letter, to conform his entry to one of the above mentioned farm units and had failed to take any action within the time allowed him. The notice is shown to have been received by the entryman on April 19, 1911.

On June 28, 1911, the entry was conformed by the General Land Office to farm unit "D" and canceled as to the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and lot 1 of section 17.

Final proof upon the entry had been submitted before the county judge of McKenzie county, North Dakota, on January 11, 1911, but was not transmitted to the register and receiver by said judge until June 26, 1911, on account of the delay of the entryman in paying the fees in connection with the final proof. Said proof was not received by the General Land Office until July 18, 1911.

On August 22, 1911, the General Land Office accepted the final proof as sufficient, as to the residence, improvement, and cultivation required by the homestead law, as to farm unit "D", and, on October 18, 1911, the local officers transmitted to the General Land Office an assignment of farm unit "E" or lots 1 and 2 and the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$

of section 17, to the wife of the entryman, Lillie M. Newlon. It will be noted that the land in sections 20 and 21 is omitted from the assignment.

On November 25, 1911, the Commissioner rejected the assignment upon the ground that the entry had been properly conformed to farm unit "D" and canceled as to the remainder of the land embraced in Newlon's original entry, and that he, therefore, had no right, title, or interest in farm unit "E" which he could assign.

It is unnecessary to decide whether Newlon's delay in filing his final proof with the local officers and his failure to respond to the notice to conform operated to deprive him of the benefit of the act of June 23, 1910 (36 Stat., 592), because this act only permits assignment subject to the limitations, charges, terms, and conditions of the reclamation act.

The reclamation act of June 17, 1902, provides that lands irrigable in reclamation projects shall be subject to entry under the homestead laws in tracts not exceeding 160 acres, and subject to determination by the Secretary of what area is sufficient for the support of a family and the reduction and conformation of such entries to the prescribed area. In other words, homestead entries like that here involved are permitted to be made on the express understanding that they will be reduced to the area determined by the Secretary to be sufficient for the support of a family.

Public irrigable lands in reclamation projects are, under the letter and spirit of the reclamation laws, to be divided among as many families as the lands will properly and reasonably support. As intimated, the assignment act of June 23, 1910, does not modify this requirement, but, on the contrary, expressly imposes it upon assignments. The attempted assignment by Newlon to his wife, Lillie M. Newlon, is in express violation of this requirement and would if permitted, simply result in the acquisition by one family of two farm units, an end not contemplated or permitted by the reclamation laws. Mrs. Newlon is not qualified to make a homestead entry under the general homestead laws, nor is she qualified to take a homestead entry by assignment under the act of June 23, 1910. For this reason the Commissioner's decision is affirmed. A further reason why the assignment can not be permitted is that the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and lots 1 and 2, Sec. 17, no longer exist, having been merged in farm unit "E" and an assignment of that unit can not be made by Newlon because it includes lands not embraced in his original entry, which have not been entered by anyone, and are not subject to entry because of the existing withdrawal.

In view of the foregoing, the conformation of Newlon's entry to farm unit "D" will not be disturbed, unless he shall in apt time elect to take in lieu thereof farm unit "E".

WARREN BOWEN.

Decided October 12, 1912.

ENLARGED HOMESTEAD—FINAL PROOF—SURVEYED AND UNSURVEYED LAND.

Final proof under the enlarged homestead act, covering both surveyed and unsurveyed land, can not lawfully be accepted, nor entry allowed, as to the unsurveyed land, until survey thereof has been made and approved.

RESIDENCE OUTSIDE OF ENTRY ON UNSURVEYED LAND.

An entryman for a surveyed tract can not, by residing upon an adjoining unsurveyed tract, receive credit for such residence upon the tract embraced in his entry.

ADAMS, *First Assistant Secretary*:

Appeal is filed by Warren Bowen from decision of the Commissioner of the General Land Office, dated April 8, 1911, rejecting final proof offered by Bowen May 31, 1910, upon his homestead entry 013249, made March 22, 1910, under the act of February 19, 1909 (35 Stat., 639), for the NE. $\frac{1}{4}$, Sec. 12, T. 10 N., R. 36 E., Tucumcari, New Mexico, land district, for the reasons that the proof, which seeks to embrace also what will be when surveyed the NW. $\frac{1}{4}$, Sec. 7, T. 10 N., R. 37 E., can not lawfully embrace unsurveyed land, and that the entryman has not complied as to the surveyed land with the requirements of the homestead law.

The decision states that the lands in T. 10 N., R. 37 E., had not been designated for entry under the act of February 19, 1909, *supra*. It appears, however, from the records of the Department that all these lands were so designated April 27, 1909.

The entry for the NE. $\frac{1}{4}$ appears to have been made by Bowen as the successful contestant against a prior homestead entry, which was canceled March 22, 1910.

The proof shows that Bowen, as a soldier during the war of the rebellion, is entitled to credit, in lieu of residence, for three years, ten months, and sixteen days military service; that he established residence March 20, 1909, in a house on the southwest corner of the NW. $\frac{1}{4}$, Sec. 7, and resided therein to date of final proof; that he cultivated about five acres in the NE. $\frac{1}{4}$, Sec. 12, and broke four acres in the NW. $\frac{1}{4}$, Sec. 7.

While the unsurveyed land, which will presumably be described as the NW. $\frac{1}{4}$, Sec. 7, T. 10 N., R. 37 E., was designated under the enlarged homestead act, it is not and will not be subject to entry until survey has been made and approved. Consequently, the action of the register and receiver and the Commissioner in refusing to accept final proof as to this land was correct. The evidence shows that Bowen's house was built and residence maintained upon the tract last described and not upon the surveyed NE. $\frac{1}{4}$, Sec. 12, embraced in his homestead entry; that this residence was established upon the

unsurveyed tract in order to hold the same and under the belief that the residence could be counted as residence upon the entire claim. This would be the fact were both tracts surveyed and embraced within his entry, but under the circumstances residence upon unsurveyed land can not be credited as residence upon the surveyed NE. $\frac{1}{4}$, Sec. 12. Furthermore, the enlarged homestead act, under which the entry is made, specifically required that at least one-eighth of the area embraced in the entry be cultivated to agricultural crops beginning with the second year of the entry, and at least one-fourth of the area so cultivated beginning with the third year.

Bowen has not complied either with the requirements of the law as originally enacted or as amended by the act of June 6, 1912, as the total area cultivated by him on the NE. $\frac{1}{4}$, Sec. 12, is five acres, or one thirty-second of the area. As to the unsurveyed NW. $\frac{1}{4}$, Sec. 7, there has been no cultivation to agricultural crops, but simply a breaking of four acres. Accordingly the decision of the Commissioner of the General Land Office is hereby affirmed, the final proof offered rejected, and the original homestead entry allowed to remain intact, subject to future compliance with law, including residence on the land included in the entry.

D. C. MAC WATTERS.

RIGHT OF WAY—RESERVOIR—SECTION 2, ACT OF FEBRUARY 21, 1911.

An application for an easement under sections 18 to 21 of the act of March 3, 1891, for a site of an irrigation reservoir, the utilization of which might jeopardize the success of a government reclamation project, should not be granted, but authority to construct such reservoir, under the supervision and control of the Secretary of the Interior, may be granted under the provisions of section 2 of the act of February 21, 1911.

Acting Secretary Adams to the Commissioner of the General Land Office, October 26, 1912.

Herewith returned is the record of your office (recently submitted upon informal request from this office) upon the application of D. C. Mac Watters (Blackfoot 09217), for an irrigation reservoir easement under the act of March 3, 1891, Secs. 18 to 21 (26 Stat., 1101). Papers herein informally submitted from the files of the Reclamation Service will be returned to that office in like manner.

The application covers a reservoir site on the South Fork of the Snake River, a short distance west of the Idaho-Wyoming boundary. East of the boundary and higher up on the same stream is Jackson Lake which has been developed by the Reclamation Service at large expense as a storage reservoir for the Minidoka project. This proj-

ect diverts water from the Snake River in Idaho far below the junction of the North and South Forks. The question is therefore presented whether a reservoir easement under the said act of March 3, 1891, should be granted for a site lying between the storage and diversion works of a government reclamation project. If such granting would jeopardize the success of the Government project the Secretary of the Interior has authority to deny the application, in which event the applicant cannot acquire the easement. *United States v. Minidoka and S. W. R. R.*, 190 Fed. Rep., 491 (C. C. A.).

It is obvious that, if this easement were granted and the reservoir constructed and operated under the grant, water stored by the Government and released from storage for use on the Government project must pass through the grantee's reservoir and during such passage be within his physical possession and control. It is true that the grantee would be under legal obligation to release it without unnecessary delay and that this obligation would be enforceable by judicial process. But the process of enforcement might involve delay which would have disastrous consequences to water users under the Government project. Moreover, the physical possibility of the prompt release of this water would depend upon the plan of the grantee's works and the efficiency with which they were constructed, operated and maintained. For a proper safeguarding of the Government project the proposed works should be constructed, operated and maintained under the control of the Government engineers.

Section 2 of the act of February 21, 1911 (36 Stat. 925), reads as follows:

SEC. 2. That in carrying out the provisions of said reclamation act and acts amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water users' associations, corporations, entrymen, or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users' associations, corporations, entrymen, or water users for impounding, delivering, and carrying water for irrigation purposes: *Provided*, That the title to and management of the works so constructed shall be subject to the provisions of section six of said act: *Provided further*, That water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres: *Provided*, That nothing contained in this act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State.

Section 6 of the reclamation act, cited in the section above quoted, reads as follows:

SEC. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided*, That when the payments required by this act are made for the major portion

of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby; to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

The conveyance and safeguarding of stored water from Jackson Lake to the Minidoka project is a part of the duty of the Secretary of the Interior "in carrying out the provisions of the reclamation act;" and the proposed reservoir, when built, "may be advantageously used by the Government" and the irrigation district, water users association, corporation, entrymen or water users interested therein. He may therefore cooperate with such district, association, corporation, entrymen or water users "for the construction and use" thereof "upon such terms as may be agreed upon" subject to the conditions imposed by section 2 of said act of 1911. Under the circumstances of this case the reservoir should be built at the cost of the cooperating applicant under the supervision and control of the Secretary of the Interior. When completed the legal title and the actual management and operation of the works would be in the Government, but the equitable right to the stored water in the cooperating applicant, subject to the Government's prior right to deliver continuously for the Minidoka project the water released from Jackson Lake for that purpose and subject also to the duty of passing through the reservoir such flow of water as is needed to satisfy prior rights of third parties.

It may be objected that section 2 of the act of February 21, 1911, contemplates cooperation in reservoir construction only in those cases where additional storage capacity is needed for the Government projects, but there is nothing in the words of the section to sustain this view unless it be the words: "The Secretary . . . is authorized to cooperate . . . for the construction or use of such *reservoirs, canals, or ditches* as may be advantageously used by the Government . . . for *impounding, delivering and carrying* water." If these words were "such reservoirs as may be advantageously used . . . for impounding water and such canals or ditches as may be used for delivering and carrying water," they would so limit the granted authority as to exclude a reservoir which could be advantageously used by the Government for delivering and carrying water. But the grant of authority over the whole subject-matter is broad and general and the suggested limitation requires a strained construction of the language actually used.

It is true that the third and final section of the act of 1911 provides that the "moneys received in pursuance of such contracts shall be

covered into the reclamation fund," but this does not warrant the inference that works constructed in pursuance of cooperation under section 2 must be actually constructed by the Government rather than by the cooperator, or, in substantial part, at its rather than solely at his expense. It is to be noted that the word "contract" is not used in section 2, and that, by section 1, "whenever, in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized to *contract*, upon such terms as he may deem just and equitable, for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity." This section is evidently limited to works constructed at Government expense and primarily for the benefit of the Government projects. Such is not the case as to section 2.

You are hereby instructed to deny the Mac Watters application and inform the applicant that he may, if he so desires, take up with the Reclamation Service the question of cooperation under section 2 of the act of February 21, 1911 (36 Stat. 925).

NOAH A. SNOOK ET AL.

Decided October 30, 1912.

RECLAMATION HOMESTEAD—ASSIGNMENT UNDER ACT OF JUNE 23, 1910.

The wife of an entryman of lands within a reclamation project is not qualified to take an assignment of part of her husband's entry under the provisions of the act of June 23, 1910.

ADAMS, *First Assistant Secretary*:

May 2, 1905, Noah A. Snook made homestead entry for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 8, and on October 6, 1906, made additional entry for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 5, and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 8, all in T. 151 N., R. 104 W., Lower Yellowstone Reclamation Project, Williston, North Dakota, land district. October 27, 1910, final proof, showing that he had maintained residence on the land since July, 1905, and had cultivated and improved same by reducing 110 acres to cultivation and by placing improvements to the value of \$1,500 thereon, was accepted.

March 4, 1911, Snook asked the Commissioner of the General Land Office whether he might assign 80 acres of his entry and obtain title for the balance. March 30, 1911, the Commissioner inclosed for his information copy of the act of June 23, 1910 (36 Stat., 592), and regulations thereunder, and advised him that a farm unit plat had been approved, designating the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 8, as farm unit B (D), the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 8, as farm unit A, and the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$,

Sec. 5, as farm unit G, and that he must conform his entry to one of said units, but might assign the others to qualified persons. Notice of the required conformation was also given by the local land office March 24, 1911.

May 23, 1911, the local land officers advised the Commissioner that Snook had received notice April 15, 1911, and had taken no action. June 13, 1911, the Commissioner conformed Snook's entry to farm unit D, or the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 8, and canceled the entry as to the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 8, and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 5. No notice of this action is shown to have been given Snook.

December 20, 1911, the local land officers transmitted two assignments executed October 31, 1911, by Snook, one for the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 8, to Clara Snook, and one for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 5, to Pearl Farrell. January 25, 1912, the Commissioner rejected the assignments, on the ground that the same were not accompanied by evidence showing the qualifications of the assignees, and on the further ground that his entry had been canceled as to those tracts prior to attempted assignments. Snook has appealed to the Department, transmitting with his appeal his affidavit and those of the assignees, to the effect that the assignments were made in good faith, and that the assignees paid therefor with their own money, hold no other farm units or entries under the reclamation act, and have no agreement or understanding with the entryman whereby the assignments shall inure to his benefit.

It appears from the record that Clara Snook is the wife of the assignor, and circumstances indicate that Pearl Farrell is the step-daughter of assignor and the wife of James Farrell, one of his final proof witnesses.

It is unnecessary at this time to decide whether the fact that Snook's assignments, made after the cancellation of his entry as to the lands sought to be assigned, might not be recognized, through appropriate departmental action, if the lands had been acquired by qualified assignees.

The reclamation act of June 17, 1902 (32 Stat., 388), provides that lands irrigable in reclamation projects shall be subject to entry under the homestead laws in tracts not exceeding 160 acres and subject to determination by the Secretary of the Interior of what area is sufficient for the support of a family, and the reduction and conformation of such entries to the prescribed area. In other words, homestead entries like that here involved are permitted to be made on the express understanding that they will be reduced to the area determined by the Secretary to be sufficient for the support of a family.

Public irrigable lands in reclamation projects are, under the letter and spirit of the law, to be divided among as many families as the lands will properly and reasonably support. The assignment act

of June 23, 1910, *supra*, does not modify this requirement, but, on the contrary, expressly imposes it upon assignments by requiring them to be subject to the limitations, charges, terms, and conditions of the reclamation act. The attempted assignment by Snook to his wife, Clara Snook, is in violation of this requirement and would, if permitted, result in the acquisition by one family of two farm units, an end not contemplated or permitted by the reclamation laws. Mrs. Snook is not qualified to make a homestead entry under the general homestead laws, nor is she qualified to take a homestead entry by assignment under the act of June 23, 1910. For this reason the Commissioner's decision as to the attempted assignment to her is affirmed.

No evidence has been submitted as to whether Pearl Farrell is a citizen of the United States, whether married or single, although as stated the record indicates that she is the stepdaughter of entryman and wife of Thomas Farrel, or if married, whether or not her husband has made entry for and is holding a homestead entry or farm unit under the reclamation laws.

The case is remanded for further consideration with respect to the attempted assignment to Pearl Farrell and will be adjudicated by the Commissioner in the light of additional evidence to be called for by him.

NOAH A. SNOOK ET AL.

Motion for rehearing of departmental decision of October 30, 1912, 41 L. D., 428, denied by First Assistant Secretary Adams, January 17, 1913.

HALL v. ARMANN.

Decided November 11, 1912.

SETTLEMENT—ABSENCE UNDER JUDICIAL ORDER.

The fact that occupancy of a settlement claim, lawfully initiated, is interrupted by order of a court does not operate as a termination or abandonment of the settlement claim.

SETTLEMENT CLAIM—PREFERENCE RIGHT OF ENTRY—TRANSFER.

The preferential right of entry conferred upon homestead settlers by section 3 of the act of May 14, 1880, is a personal privilege which can not be transferred to another; and no such right is acquired by an attempted purchase of a settlement claim as will defeat the rights of an intervening settler.

RESIDENCE ON SETTLEMENT CLAIM—OFFICIAL EMPLOYMENT.

While homestead entrymen have sometimes been allowed credit for constructive residence during absences due to official employment, such absences have never been recognized as residence on mere settlement claims prior to entry.

ADAMS, First Assistant Secretary:

On February 23, 1909, the plat of the resurvey of T. 16 S., R. 16 E., S. B. M., Los Angeles, California, land district, was filed in the local

office and, on the same day, Hannes H. Armann filed his homestead application for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 24, of said township and range. On March 6, 1909, Maude Hall filed her homestead application for lots 16 and 18 and the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 13, and the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24, of the same township. These applications conflict as to the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24, and hearing was had to determine the rights of the parties thereto.

On September 13, 1911, the local officers awarded the tract in controversy to Armann and, by decision of January 19, 1912, the Commissioner of the General Land Office affirmed their decision. Hall has appealed to the Department.

The material facts of the case, as disclosed by the record, are as follows:

In 1906, one Paul Boman settled upon the land described in Hall's application. At that time homestead entries were not allowed in that territory, under the practice established by the General Land Office and approved by the Department, pending the resurvey to be made under the act of July 1, 1902 (32 Stat., 728). Boman resided upon this land, with his family, until about October 1, 1907, when, having been elected to a county office, he removed, with them, to El Centro, California, the county seat. During the period of his residence on the land he cleared a portion thereof of sage brush, constructed a ditch, and purchased water stock. Some of the improvements were upon the tract in controversy. Armann did some of the work upon the disputed tract, as Boman's employee, and, being desirous of securing a tract of public land, settled upon the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 24, embraced in his pending application, and the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 25, of the township above referred to, during the summer of 1907.

After Boman left the land, with his family, in the fall of 1907, Armann learned that he was making an effort to sell the claim, and, having been informed by the register and receiver at Los Angeles that only occupancy would protect a claim in the resurveyed area, prior to the filing of the plat, he proceeded to take possession of the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ of section 24, the land in controversy in this proceeding. He built a house upon the tract and, with his brother, performed some work of cultivation thereon. Boman instituted a proceeding for possession of the land against Armann, and the latter was evicted by an order of the local court on February 14, 1908. On April 11, 1908, he was fined for contempt of court in that he had disregarded the order and returned to the land. Pursuant to the mandate of the court he then removed his house from the tract and performed no further work thereon. A settlement lawfully initiated and occupancy thereunder interrupted in obedience to an order of court is not thereby terminated or abandoned. Particularly is that so in a

case like this, where the party maintained his claim through occupancy of other land included within his asserted claim.

In June, 1908, Boman sold his settlement claim, improvements, and water stock to Mrs. Anna W. Hall, who, in turn, transferred the same to Maude Hall, on August 26, 1908. The latter has lived ever since in a five-room house in the northern part of the 160 acres claimed by her and upon the 80 acres in controversy she cultivated 10 acres to crop in 1908 and 1909, but none in 1910, owing to a failure in the water supply.

The preferential right of entry conferred upon homestead settlers by section 3 of the act of May 14, 1880 (21 Stat., 140), is, like the right created in favor of successful contestants by section 2 of said act, a personal privilege which can not be transferred to another. Neither right constitutes any interest or estate in the land, nor segregates it from the public domain and the right of others to apply for or to settle upon the land, subject to defeasance only if the preferential right is asserted within the time prescribed by law, has been uniformly recognized by the Department. It follows, therefore, that, without reference to the question of Boman's abandonment of his settlement thereon, Armann's claim is superior to Hall's, since her settlement was junior to his, and her purchase did not carry a right except in the improvements. Armann was properly advised by the local officers that only continued occupancy would protect a settlement claim. Previous departmental holdings extending credit for residence to those actual residents upon public land, under an entry, in instances of subsequent absence due to performance of official duty, have never been applied to a mere settlement not asserted through entry; consequently, when Boman left the land in 1907 his preferential right, secured by prior settlement, was at an end. This right could not be transferred; neither could it be urged through an attempted purchase from the original settler as against intervening rights secured through settlement by another.

It is urged in the appeal that Armann concealed the extent of his claim from Hall and has, therefore, acted in bad faith. However, the local officers, after hearing the testimony of both parties and their witnesses, acquitted Armann "of any bad faith or breach of confidence in the premises," while expressing doubt as to the good faith of Hall's application. The decision of the Commissioner contains a full recital of Armann's alleged evasive replies to Boman and one Watson, relative to the extent of his claim and the events leading thereto, and the same will not, therefore, be repeated herein. The Department is unable to find, from the testimony, that either Boman or Hall had any reasonable ground for believing that Armann had relinquished his right to the land in controversy.

Armann's application having been filed first, he is entitled to make entry of the land unless Hall shows a prior settlement right. This she has failed to do. Whatever occupation she had of the 80 acres in controversy was subsequent to Armann's occupation thereof and while Armann was-prevented by order of court, obtained by Hall's mesne grantor, from continuing his occupation.

The decision of the Commissioner is affirmed.

RECLAMATION—TRUCKEE-CARSON PROJECT—FAILURE TO MAKE PAYMENT.

ORDER.

DEPARTMENT OF THE INTERIOR,

Washington, November 14, 1912.

In view of the losses which have been suffered on account of partial failure of the water supply for the Truckee-Carson Project, Nevada, in the irrigation season of 1912, the following order is hereby issued in pursuance of the Reclamation Act of June 17, 1902 (32 Stat., 388), and acts supplementary thereto or amendatory thereof, viz:

No action looking to cancellation of entries or water-right applications under the said project for failure to make payment of the portion of the instalment for building the irrigation system due December 1, 1911, shall be taken until December 1, 1913, in any case where fifty cents per acre has been paid on account thereof; provided, however, that this order shall not apply to entries or water-right applications on which two or more instalments of the building charge shall remain due and unpaid on November 30, 1912, or upon which any instalment for operation and maintenance shall remain due and unpaid on November 30, 1912.

WALTER L. FISHER,
Secretary of the Interior.

INSTRUCTIONS.

OKLAHOMA PASTURE AND WOOD RESERVES—SCHOOL SECTIONS.

Sections 13, 16, 33 and 36 in the so-called pasture and wood reserves, are subject to disposition for the benefit of the Indians under the provisions of the act of Congress of March 3, 1911, and did not pass to the State of Oklahoma under its school grant, which must be satisfied, so far as these lands are concerned, under the indemnity provisions of the act of June 6, 1900.

First Assistant Secretary Adams to the Commissioner of the General Land Office, November 19, 1912.

Your letter of November 1, 1912, asks for instructions as to whether or not the title to lands in sections 13, 16, 33 and 36, in the

former pasture and wood reserves in the Kiowa, Comanche and Apache Indian reservations, where no indemnity has been selected, passes to the State under the act of Congress of June 16, 1906 (34 Stat., 267), or whether said lands must be disposed of for the benefit of the Indians, leaving the State to satisfy its grant to the extent of lands in said reserves, under the indemnity provisions of the act of June 6, 1900 (31 Stat., 672).

The act of June 6, 1900, *supra*, ratified and confirmed the agreement under which the Comanche, Kiowa and Apache tribes of Indians undertook to sell, relinquish, and transfer to the United States lands theretofore reserved and occupied by them in the then Territory of Oklahoma. One of the conditions of the agreement was that there should be reserved and set aside out of the area ceded, 480,000 acres of grazing lands for the use of said Indians. There had also been reserved within the limits of the area ceded 25,000 acres of land known as the Fort Sill Wood Reserve, which was created by executive order of March 8, 1892. The act of June 6, 1900, after providing for the disposition of the lands ceded under the homestead laws, with a fixed price, for the benefit of the Indians, stated—

That sections sixteen and thirty-six, thirteen and thirty-three of the lands hereby acquired in each township shall not be subject to entry but shall be reserved, sections sixteen and thirty-six for the use of the common schools, and sections thirteen and thirty-three for university, agricultural colleges, normal schools and public buildings of the Territory and future State of Oklahoma: and in case either of said sections or parts thereof is lost to said Territory by reason of allotment under this act, or otherwise, the Governor thereof is hereby authorized to locate other lands, not occupied, in quantity equal to the loss.

Proclamation of the President of the United States issued under the foregoing act July 4, 1901, excepting from disposition lands allotted to Indians, lands included within the wood reserve, and the grazing lands mentioned in the agreement which had theretofore been designated and set aside by the Secretary of the Interior.

The act of June 5, 1906 (34 Stat., 213), provided for the sale of the 480,000 acres of land reserved for grazing purposes and the 25,000 acres set apart as a wood reservation, to persons qualified to make entry under the homestead laws, under rules and regulations to be prescribed by the Department of the Interior at not less than \$5.00 per acre. It was further provided in said act that the money received from the sale of the lands should be paid into the Treasury, placed to the credit of the Indians, and the principal and interest expended for their benefit.

By act of March 3, 1911 (36 Stat., 1069), the Secretary of the Interior was authorized in his discretion to sell, on such terms and

under such rules as he may prescribe, the unused, unallotted and unreserved lands of the United States in the Kiowa, Comanche and Apache reservations. Section 7 of the act of June 16, 1906 (34 Stat., 267), an act to enable the people of Oklahoma and Indian Territory to form a constitution and State government and to be admitted into the Union, provided that upon the admission of the State into the Union sections 16 and 36 in every township in Oklahoma, and lands selected in lieu thereof, should be granted to the State for the benefit of common schools but that any such sections embraced in Indian, military or other reservation, or lands owned by Indian tribes, shall not be subject to the grant or to its indemnity provisions "until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain." Section 8 of the same act granted sections 13 and 33 to the State for university and other specified purposes. While no specified statement is made in said section as to the status of sections 13 and 33 included in existing reservations, legally they occupy the same status as sections 16 and 36, and under the general provisions of the law relating to indemnity the State would be entitled to the right of indemnity for lands so reserved and ultimately lost from the grant.

It appears from the statement contained in your letter that the Territory of Oklahoma made indemnity selections in lieu of sections 13 and 16, 33 and 36 in the pasture reserve and wood reserve, except as to six or seven fractional acres in pasture and wood reserves; one of said indemnity selections coming before this Department for consideration as to sufficiency of the base February 25, 1907, and being on that date approved.

Prior to the passage of the act of June 6, 1900, these and other lands included within the Kiowa, Comanche and Apache Indian reservations were reserved for and occupied by said Indian tribes and not subject to disposition to the Territory of Oklahoma or to anyone else. In the agreement ratified by said act, the Indians ceded to the United States for appropriate disposition the lands in their said reserve but expressly excepted from such cession the 480,000-acre pasture reserve, and the President's proclamation expressly excepted the Fort Sill Wood Reserve theretofore withdrawn. Said tracts did not, therefore, become subject to the school-land grant contained in said act. It was not until June 5, 1906, that Congress vacated the pasture and wood reserves and provided for their disposition. The act of that date did not provide for the granting of sections 13, 16, 33 and 36 to the State of Oklahoma but, on the contrary, provided for the disposition of the lands at not less than \$5.00 per acre for the benefit of the Indians.

There is nothing in the act of Congress of June 16, 1906, which repeals or modifies the provisions of the act of June 5, *supra*, with respect to the pasture and wood reserve lands. The latter act granted to the State of Oklahoma only those lands not theretofore devoted to or reserved for other uses and purposes. As said by the Supreme Court in *Leavenworth, etc., R. R. Co. v. United States* (92 U. S., 741-2), in reference to grants to States and railroads—

Such grants could not be otherwise construed: for Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of it was not necessary; because the policy which dictated them confined them to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. The legislation which reserved it for any purpose excluded it from disposal as the public lands are usually disposed of; and this act discloses no intention to change the long-continued practice with respect to tracts set apart for the use of the government or of the Indians.

Sections 13, 16, 33 and 36 within the pasture and wood reserves had been withheld and reserved from disposition to the State, or others, for specific purposes connected with the welfare of the Indian tribes, and the military necessities of the United States. They did not become subject to the grant to the State, made in the act of June 6, 1900, and in the enabling act of June 16, 1906, but were, because of their reservation and of their subsequent devotion to the Indians, through the sales directed by act of June 5, 1906, lost to the State of Oklahoma, which was relegated to the selection of other lands in lieu thereof, as provided in said act of June 6, 1900. That such is the case has been recognized by the Territory in the making of the indemnity selections for the portions of the sections involved, as hereinbefore described. At least one of such selections has been made and approved since the passage of the acts of June 5, and 16, 1906.

It must be assumed that such was the intention and purpose of Congress, because otherwise the rights of the Indians as to four of the sections in each of the townships involved would be lost without compensation as against the claim of the State, while, under the view herein expressed, and under the indemnity provisions of the act of June 6, 1900, the State has had provision made for the satisfaction of its entire grant through the selection of other lands.

In view of the foregoing, I have therefore to advise you that sections 13, 16, 33 and 36 in the so-called pasture and wood reserves, are subject to disposition for the benefit of the Indians under the provisions of the act of Congress of March 3, 1911, *supra*, and did not pass to the State of Oklahoma under its school grant, which must be satisfied, as far as these lands are concerned, under the indemnity provisions of the act of June 6, 1900.

BASSETT v. SUNDERLIN.

Decided November 25, 1912.

PRACTICE—NOTICE TO CONTESTANT OF PREFERENCE RIGHT.

Section 2 of the act of May 14, 1880, contemplates that the notice of preference right to a successful contestant shall issue at a time when the land is subject to entry and be sent to contestant personally; and notice that the land will become subject to entry at some future day, or notice by publication, or notice to his attorney, unless shown to have been actually received by contestant, is not sufficient.

LAYLIN, Assistant Secretary:

On May 28, 1910, the entry of one Mayne M. Cross, for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 33, T. 6 N., R. 2 W., B. M., Boise, Idaho, land district, was canceled by the General Land Office on the contest of George M. Bassett, and directions were given that he be notified of his preference right. Said lands were then embraced in a second form withdrawal, made on December 23, 1903, in connection with the Boise Valley project, and were restored to settlement on September 17, and to entry on October 17, 1910, by the order of June 16, 1910, notice of which was given by publication.

In connection with this contest against the Cross entry, Bassett executed and filed in the local office a power of attorney as follows:

I, George M. Bassett, of Greenleaf, Idaho, do hereby appoint Walter R. Cupp as my agent and I hereby authorize him to act for me and in my behalf, to represent me and my interests fully in the above entitled contest before or through the United States land office, at Boise, or wherever and whenever the said case, or any motion or action arising thereon, may come up for hearing.

Dated June 3, 1909.

GEORGE M. BASSETT.

Bassett was notified of the cancellation of Cross's entry and, on July 8, 1910, filed his desert land application for the land embraced in said entry. The receiver's receipt for the money tendered with his application was received by Bassett and, as he now avers, was regarded as evidence that his application had been allowed.

It appears, however, that, on July 8, 1910, Bassett's application was rejected for the reason that the land was not then subject to entry, and the said Walter R. Cupp was notified of such action, and that the land would become subject to entry October 17, 1910. Said notice was receipted for by Cupp, "as agent for George M. Bassett," on July 9, 1910. On February 8, 1911, one Caroline K. Lamkin made homestead entry of said tract.

On June 17, 1911, Bassett wrote to the Commissioner of the General Land Office, representing that he had never received any notice of the rejection of his application, and that, in June, 1911, when he went upon the land for the purpose of making the expenditures required by law and after he had done work thereon to the value of

\$50, he was informed of the Lamkin entry. Bassett further stated that Cupp had been employed to represent him at the hearing only and that, at the conclusion of the hearing, he had paid Cupp for his services and regarded the employment of his said counsel as terminated.

On July 10, 1911, Bassett was notified of the allowance of the Lamkin entry and advised that he might file another application and, in case of the rejection thereof, that he might appeal. Pursuant to such advice, Bassett, on July 28, 1911, filed his desert land application for the land, accompanied by his affidavit, in which the facts with reference to his contest, his first application, and its rejection were reiterated. Said application was rejected by the local officers and Bassett, in due season, appealed to the Commissioner of the General Land Office. In said appeal, it was alleged that Bassett had already expended an amount almost, if not quite, sufficient for the first annual proof required by the desert land law. On August 10, 1911, a relinquishment of the Lamkin entry was filed in the local office and, notwithstanding the pendency of Bassett's appeal, Charles M. Sunderlin was allowed to make desert land entry for said land.

On January 20, 1912, the Commissioner of the General Land Office, after reviewing the facts substantially as hereinbefore stated, directed the issuance of a rule to Sunderlin to show cause, within thirty days, why his entry should not be canceled for conflict with the superior right of Bassett.

In answer to the rule, Sunderlin filed his unverified statement, in which he alleged that he had purchased the relinquishment of Lamkin's entry for a valuable consideration, without knowledge of the pendency of any application or claim by Bassett and after having examined the records of the local office and finding no such claim noted thereon; that notice of the rejection of the application of Bassett and of the preference right having been sent to and received by Bassett's attorney, Bassett was bound thereby, especially as the latter had slept upon his rights; and that, under paragraph 19 of the regulations of May 31, 1910 (38 L. D., 620), as amended by the circular of October 15, 1910 (39 L. D., 296), Bassett was entitled to only thirty days from notice that the lands in controversy were restored to entry or covered by public notice in which to exercise his preference right, and that as such notice had been duly published, Bassett was duly notified of his right by such publication and foreclosed accordingly.

Section 2 of the act of May 14, 1880 (21 Stat., 140), undoubtedly contemplates that the notice of preference right to a successful contestant shall issue at a time when the land is subject to entry, since time begins to run against the contestant from date of such notice. The preference right notice can not be given by publication, as argued

by Sunderlin, nor will the giving of notice that the land will become subject to entry at some future day be regarded by this Department as the proper performance by the register of his duty in the premises, especially where the contestant has made payment of a fee of one dollar for special notice. A showing of reasonable diligence on the part of Bassett, however, would be insisted upon were there any evidence that he actually received the notice from the local officers of the cancellation of Cross's entry and of his preference right; for, whatever the technical objection to such notice, it was sufficient to charge him with knowledge of the facts that Cross's entry had been canceled upon his contest and that the lands would become subject to entry on October 17, 1910. If any undue delay or laches in the assertion of claim on the part of Bassett, appeared of record or was asserted by Sunderlin in defense of his entry, to which might reasonably be ascribed the intervention of the adverse claim of Sunderlin, Bassett might be held estopped from asserting a preference right to defeat such claim. But the notice to his former attorney, not having been shown to have been received by him, was ineffectual as notice for any purpose. See *Weisbeck v. McGee* (36 L. D., 247); [*Saugstad v. Fay*, 39 L. D., 160]. The money received from Bassett upon his application, filed on July 8, 1910, not having been returned to him, his inference that the application had been allowed was a reasonable one. He went upon the land, so far as the record discloses, within a year from the date of the supposed allowance of his entry, to make the expenditure required by law of a desert land entryman, and, learning of the intervening entry, formally and before the intervention of any right on the part of Sunderlin, asserted his claim.

Sunderlin, after full opportunity to make a showing of facts which might have estopped Bassett from exercising his preference right, secured through contest, has failed to do so, and it being manifest from the record that Bassett was not advised of such preference right of entry, as the regulations required, and that he has acted with reasonable diligence in the assertion of his claim, the decision of the Commissioner is found to be proper and is, accordingly, affirmed.

ATTORNEYS AND AGENTS—RECOGNITION TO PRACTICE BEFORE DEPARTMENT.

LAWS AND REGULATIONS.

LAWS.

The following statutes relate to the recognition of attorneys and agents for claimants before this department:

That the Secretary of the Interior may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claim-

ants before his Department, and may require such persons, agents, and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good moral character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their claims and such Secretary may, after notice and opportunity for a hearing, suspend or exclude from further practice before his Department any such person, agent or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud in any manner deceive, mislead, or threaten any claimant, or prospective claimant, by word, circular, letter, or by advertisement. [Act July 4, 1884, sec. 5; 23 Stat., 101.]

Whoever, being an officer of the United States, or a person holding any place of trust or profit, or discharging any official function under, or in connection with, any Executive Department of the Government of the United States, or under the Senate or House of Representatives of the United States, shall act as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, shall aid or assist in the prosecution or support of any such claim, or receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both. [Act of March 4, 1909, sec 109; 35 Stat., 1107.]

It shall not be lawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk, or employé in any of the Departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said Departments while he was such officer, clerk, or employé, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employé. [Section 190, Revised Statutes.]

Any person prosecuting claims, either as attorney or on his own account, before any of the Departments or Bureaus of the United States, shall be required to take the oath of allegiance, and to support the Constitution of the United States, as required of persons in the civil service. [Section 3478, Revised Statutes.]

The oath provided for in the preceding section may be taken before any justice of the peace, notary public, or other person who is legally authorized to administer an oath in the State or district where the same may be administered. [Section 3479, Revised Statutes.]

The act of May 13, 1884 (23 Stat., 22), provides that the oath above required shall be that prescribed by section 1757, Revised Statutes, which is as follows:

I, ———, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

REGULATIONS.

1. Under the authority conferred on the Secretary of the Interior by the fifth section of the act of July 4, 1884, it is hereby prescribed that an attorney at law who desires to represent claimants before the department or one of its bureaus shall file a certificate of the clerk of the United States, State, or Territorial court, duly authenticated under the seal of the court, that he is an attorney in good standing.

2. Any person (not an attorney at law) who desires to appear as agent for claimants before the department or one of its bureaus must file a certificate from a judge of a United States, State, or Territorial court, duly authenticated under the seal of the court, that such person is of good moral character and in good repute, possessed of the necessary qualifications to enable him to render claimants valuable service, and otherwise competent to advise and assist them in the presentation of their claims.

3. The Secretary may demand additional proof of qualifications, and reserves the right to decline to recognize any attorney, agent, or other person applying to represent claimants under this rule.

4. The oath of allegiance required by section 3478 of the United States Revised Statutes must also be filed.

5. Firms of agents or attorneys, as such, will not be admitted to practice before this department or recognized as having the right to appear before it or any bureau or office thereof in any proceeding or matter involving the services of an agent or attorney, and in the presentation of any matter by any such firm, every pleading, brief, motion, or other paper or communication shall be signed individually by one or more duly qualified members thereof and such signatures shall be considered as a certificate by such agent or attorney that he has read the paper so signed by him; that upon the instructions laid upon him regarding the case there is good ground for the same; that no scandalous matter is inserted therein; and that it is not interposed for delay.

If any firm of attorneys or agents shall retain as a member thereof, or receive into such membership any person who stands disbarred or suspended from the practice of this department, its bureaus or offices, all of the members thereof who may have been admitted to practice shall be subject to disbarment.

6. Unless specially called for, the certificate above referred to will not be required of an attorney or agent heretofore recognized and now in good standing before the department.

7. An applicant for admission to practice under the above regulations must address a letter to the Secretary of the Interior, inclosing the certificate and oath above required, in which letter his full name and post-office address must be given. He must state whether or

not he has ever been recognized as attorney or agent before this department or any bureau thereof, and, if so, whether he has ever been suspended or disbarred from practice. He must also state whether he holds any office of trust or profit under the Government of the United States.

8. No person who has been an officer, clerk, or employee in this department shall, after his separation therefrom, appear as counsel before the department in any matter or cause which has been pending therein during the period of his employment in the department where said cause had had such consideration or attention by him of a confidential nature or otherwise of such character as to render it improper for him to so appear.

9. Whenever an attorney or agent is charged with improper practices in connection with any matter before a bureau of this department, the head of such bureau shall investigate the charge, giving the agent or attorney due notice, together with a statement of the charge against him, and allow him an opportunity to be heard in the premises. When the investigation shall have been concluded, all the papers shall be forwarded to the department, with a statement of the facts and such recommendations as to disbarment from practice as the head of the bureau may deem proper, for the consideration of the Secretary of the Interior. During the investigation the attorney or agent will be recognized as such, unless for special reasons the Secretary shall order his suspension from practice.

(a) In any hearing provided for in section 5 of the act of July 4, 1884, and in the foregoing rule, after issue of citation, upon charges against an attorney or agent, the oath of any witness to the verity of his testimony may be administered by any officer duly authorized to administer oaths for general purposes.

(b) Depositions for use in any such hearing may be taken by either party before any officer duly authorized to administer an oath for general purposes upon ten days' notice in writing if the taking of depositions be within the District of Columbia, and upon twenty days' notice in writing if to be taken without the District of Columbia.

10. If any attorney or agent in good standing before the department shall knowingly employ as subagent or correspondent a person who has been prohibited from practice before the Department, it will be sufficient reason for the disbarment of the former from practice.

11. Upon the disbarment of an attorney or agent notice thereof will be given to the heads of bureaus of this department and to the other executive departments, and thereafter, until otherwise ordered, such disbarred person will not be recognized as attorney or agent in

any claim or other matter before this department or any bureau thereof.

The foregoing regulations will govern the recognition of agents, attorneys, and other persons before the department of the Interior and the bureaus thereof, and are in lieu of those approved July 10, 1911.

SAMUEL ADAMS.

First Assistant Secretary.

WASHINGTON, D. C., *December 6, 1912.*

ISOLATED TRACTS—SECTION 2455, R. S., AS AMENDED MARCH 28, 1912.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., December 18, 1912.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: The sale of isolated tracts of public lands outside of the area in the State of Nebraska described in the act of March 2, 1907 (34 Stat., 1224), is authorized by the provisions of the act of March 28, 1912 (37 Stat., 77), amending section 2455 of the Revised Statutes.

GENERAL REGULATIONS.

1. Applications to have isolated tracts ordered into market must be filed with the register and receiver of the local land office in the district wherein the lands are situated. The applicant must deposit with the receiver, in the form of cash or postal money order, an amount equal to the value of the land based upon the minimum price fixed for public lands, which will be ordinarily \$1.25 per acre, or \$2.50 per acre if within railroad limits, or such price as may be fixed by special statute governing the disposition of the land applied for. The receiver will issue receipt therefor and deposit the money to his credit as "unearned moneys." Should the applicant be the successful bidder at the sale, he will be given credit on the amount bid for the sum deposited with his application, and the receiver will apply the same as a part of the purchase money. If applicant is not the successful bidder, the receiver will return the sum deposited by his official check. Should the applicant withdraw his deposit, his action will be treated as a withdrawal of the application for sale and will be promptly so reported by the local officers. Money so deposited

will not be returned by the receiver after receipt of the letter from this office ordering a tract into the market until the case is finally disposed of either by entry of the land, its sale to some one other than the applicant, or no sale.

2. Applicants must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal, or other minerals; the amount, kind, and value of timber or stone thereon, if any; whether the land is occupied, and, if so, the nature of the occupancy; for what purpose the land is chiefly valuable; why it is desired that same be sold; that applicant desires to purchase the land for his own individual use and actual occupation and not for speculative purposes, and that he has not heretofore purchased under section 2455, Revised Statutes, or the amendments thereto, isolated tracts the area of which, when added to the area now applied for, will exceed approximately 160 acres; and that he is a citizen of the United States. If applicant has heretofore purchased lands under the provisions of the acts relating to isolated tracts, same must be described in the application by subdivision, section, township, and range.

3. The affidavits of applicants to have isolated tracts ordered into market, and of their corroborating witnesses, may be executed before any officer having a seal and authorized to administer oaths in the county or land district in which the tracts described in the applications are situated.

4. The officer before whom such affidavits are executed will cause each applicant and his witnesses to fully answer the questions contained upon the accompanying form and, after the answers to the questions therein contained have been reduced to writing, to sign and swear to same before him.

5. No sale will be authorized upon the application of a person who has purchased under section 2455, Revised Statutes, or the amendments thereto, any lands the area of which, when added to the area applied for, shall exceed approximately 160 acres.

6. Only one tract may be included in an application for sale, and no tract exceeding approximately 160 acres in area will be ordered into the market.

7. No tract of land will be deemed isolated and ordered into the market unless, at the time application is filed, the said tract has been subject to homestead entry for at least two years after the surrounding lands have been entered, filed upon, or sold by the Government, except in cases where some extraordinary reason is advanced sufficient, in the opinion of the Commissioner of the General Land Office to warrant waiving this restriction.

8. The local officers will on receipt of applications note same upon the tract books of their office, and if the applications are not properly

executed, or not corroborated, they will reject the same subject to the right of appeal. Applications found to be properly executed and corroborated will be disposed of as follows: (a) If all, or any portion, of the land applied for is not subject to disposition under the provisions of paragraph 7, or by reason of some prior appropriation of the land, the application will be forwarded to the General Land Office with the monthly returns, accompanied by a report as to the status of the land applied for and the surrounding lands, and any other objection to the offering known to the local officers. Upon determining what portion, if any, of the lands applied for should be ordered into the market, the Commissioner of the General Land Office will call upon the local officers and the Chief of Field Division for the report, as next provided for, concerning the value of the land. (b) If all of the land applied for is vacant and not withdrawn or otherwise reserved from such disposition, and the status of the surrounding lands is such that a sale might properly be ordered under paragraph 7, the local officers, after noting the application on their records, will promptly forward the same to the Chief of Field Division for report as to the value of the land and any objection he may wish to interpose to the sale, and the register will make proper notations on his schedule of serial numbers in the event the application is not returned in time to be forwarded with the returns for the month in which it is filed. Upon receipt of the application from the Chief of Field Division with his report thereon, the local officers will attach their report as to the status of the land and that surrounding, the value of the land applied for, if they have any knowledge concerning the same, and any objection to the sale known to them, and forward the papers to the General Land Office with the returns for the current month.

9. An application for sale under these instructions will not segregate the land from entry or other disposal, for such lands may be entered at any time prior to the day of sale. Should all of the land applied for be entered or filed upon while the application for sale is in the hands of the Chief of Field Division, the local officers will so advise him and request the return of the application for forwarding to the General Land Office. Likewise, should any or all of the land be entered or filed upon while the application for sale is pending before the General Land Office, the local officers will so report by special letter.

10. Upon receipt of letter authorizing the sale, the local officers will at once examine the records to see whether the tract, or any part thereof, has been entered. If the examination of the record shows that all of the tract has been entered or filed upon, the local officers will not promulgate the letter authorizing the sale, but will report the facts to the General Land Office, whereupon the letter authoriz-

ing the sale will be revoked. If a part of the land has been entered they will so report and proceed as provided below as to the remainder. If thereafter, and at any time prior to the date set for sale, a portion of the land applied for is entered or filed upon, that portion will be eliminated from the sale; and if all the land is entered or filed upon, no sale will be held. In either event the applicant should be promptly advised by ordinary mail and report made to this office on or after date of sale. In all cases where no sale is had the land will, in the absence of other objection, become subject to entry or filing at once, without action by this office.

The local officers will prepare a notice for publication on the form hereinafter given, describing the land found to be unentered, and fixing a date for the sale, which date must be far enough in advance to afford ample time for publication of the notice, and for the affidavit of the publisher to be filed in the local land office prior to the date of the sale. The register will also designate a newspaper as published nearest to the land described in the notice. The notice will be sent to the applicant with instructions that he must publish the same at his expense in the newspaper designated by the register. Payment for publication must be made by applicant directly to the publisher, and in case the money for publication is transmitted to the receiver, he must issue receipt therefor, and immediately return the money to the applicant by his official check, with instructions to arrange for the publication of the notice as hereinbefore provided.

If on the day set for the sale the affidavit of the publisher, showing proper publication, has not been filed in the local land office, the register and receiver will report that fact to this office, and will not proceed with the sale.

11. Notice must be published once a week for five consecutive weeks (or thirty consecutive days, if in a daily paper) immediately prior to the date of sale, but a sufficient time should elapse between the date of last publication and date of sale to enable the affidavit of the publisher to be filed in the local land office. The notice must be published in the paper designated by the register as nearest the land described in the application. The register and receiver will cause a similar notice to be posted in the local land office, such notice to remain posted during the entire period of publication. The publisher of the newspaper must file in the local land office, prior to the date fixed for the sale, evidence that publication has been had for the required period, which evidence may consist of the affidavit of the publisher, accompanied by a copy of the notice published.

12. At the time and place fixed for the sale the register or receiver will read the notice of sale and allow all qualified persons an opportunity to bid. Bids may be made through an agent personally present at the sale, as well as by the bidder in person. The register

or receiver conducting the sale will keep a record showing the names of the bidders and the amount bid by each. Such record will be transmitted to this office with the other papers in the case.

The sale will be kept open for one hour after the time mentioned in the published notice. At the expiration of the hour, and after all bids have been offered, the local officers will declare the sale closed, and announce the name of the highest bidder, who will be declared the purchaser, and he must immediately deposit the amount bid by him with the receiver (allowing credit for the original deposit, if applicant is the successful bidder), and within 10 days thereafter furnish evidence of citizenship, nonmineral and nonsaline affidavit, Form 4-062, or nonsaline affidavit, Form 4-062a, as the case may require. Upon receipt of the proof, and payment having been made for the lands, the local officers will issue the proper final papers.

13. No lands will be sold at less than the price fixed by law, nor at less than \$1.25 per acre. Should any of the lands offered be not sold, the same will not be regarded as subject to private entry unless located in the State of Missouri (act of March 2, 1889, 25 Stat., 854), but may again be offered for sale in the manner herein provided.

14. After each offering where the lands offered are *not* sold, the local officers will report by letter to the General Land Office. No report by letter will be made when the offering results in a sale, but the local officers will issue cash papers as in ordinary cash entries, noting thereon the date of the letter authorizing the offering, and report the same in their current monthly returns. With the papers must also be forwarded the affidavit of publisher showing due publication, and the register's certificate of posting.

ACT OF MARCH 28, 1912.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-four hundred and fifty-five of the Revised Statutes of the United States be amended to read as follows:

"SEC. 2455. It shall be lawful for the Commissioner of the General Land Office to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than one dollar and twenty-five cents an acre, any isolated or disconnected tract or parcel of the public domain not exceeding one-quarter section which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land officers of the district in which such land may be situated: *Provided*, That any legal subdivisions of the public land, not exceeding one-quarter section, the greater part of which is mountainous or too rough for cultivation, may, in the discretion of said Commissioner, be ordered into the market and sold pursuant to this act upon the application of any person who owns lands or holds a valid entry of lands adjoining such tract, regardless of the fact that such tract may not be isolated or disconnected within the meaning of this act: *Provided further*, That this act shall not defeat any vested right which has already attached under any pending entry or location."

Approved, March 28, 1912.

REGULATIONS UNDER FIRST PROVISIO TO ACT OF MARCH 28, 1912.

The first proviso to the act of March 28, 1912, authorizes the sale of legal subdivisions not exceeding one-quarter section, the greater part of which is mountainous and too rough for cultivation, upon the application of any person who owns or holds a valid entry of lands adjoining such tract and regardless of the fact that such tract may not be actually isolated by the entry or other disposition of surrounding lands. It is left entirely to the discretion of the Commissioner of the General Land Office to determine whether a tract shall be sold, and it will not be practicable to prescribe a set of rules governing the conditions which would render a tract susceptible to sale under the proviso. Applications will be disposed of by you in accordance with the "general regulations," except paragraph 7, which is not applicable. Applications may be made upon the form provided (4-088B) and printed herein, properly modified as necessitated by the terms of the proviso. In addition the applicant or applicants must furnish proof of his or their ownership of the whole title to adjoining land, or that he holds a valid entry embracing adjoining land, in connection with which entry he has fully met the requirements of law; also detailed evidence as to the character of the land applied for, the extent to which it is cultivable, and the conditions which render the greater portion unfit for cultivation; also a description of any and all lands theretofore applied for under the proviso or purchased under section 2455 or the amendments thereto. This evidence must consist of an affidavit by the claimant, corroborated by the affidavits of not less than two disinterested persons having actual knowledge of the facts.

No sale will be authorized under the proviso upon the application of a person who has procured one offering thereunder except upon a showing of strong necessity therefor owing to some peculiar condition which prevented original application for the full area allowed to be sold at one time, 160 acres. And in no event will an application be entertained where the applicant has purchased under section 2455, or the amendments thereto, an area which, when added to the area applied for, shall exceed approximately 160 acres.

In the notices for publication and posting, where sale is authorized under the proviso, you will add after the description of the land, "This tract is ordered into the market on a showing that the greater portion thereof is mountainous and too rough for cultivation."

ISOLATED TRACTS OF COAL LAND.

The act of Congress approved April 30, 1912 (37 Stat., 105), provides:

That * * * unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall * * * be subject * * * to disposition * * * under the

laws providing for the sale of isolated or disconnected tracts of public lands, but there shall be a reservation to the United States of the coal in such lands so * * * sold, and of the right to prospect for, mine, and remove the same in accordance with the provisions of the act of June twenty-second, nineteen hundred and ten, and such lands shall be subject to all the conditions and limitations of said act.

In administering this act the foregoing regulations should be followed, in so far as they are applicable, and these additional instructions are prescribed:

(1) An application to have coal land offered at public sale must bear on its face the notation provided by paragraph 7(a) of the circular of September 8, 1910, 39 L. D., 179; in the printed and posted notice of sale will appear the statement:

This land will be sold in accordance with, and subject to, the provisions and reservations of the act of June 22, 1910 (36 Stat., 583).

The purchaser's consent to the reservation of the coal in the land to the United States will not be required, but the cash certificate and patent will contain, respectively, the provisions specified in paragraph 7(b) of said circular of September 8, 1910.

(2) In cases where offerings have been had, and sales made, of lands coming within the purview of the act of April 30, 1912, the purchasers may furnish their consent to receive patents, containing the limitation provided by said paragraph 7(b), and, thereupon, the entries may be confirmed and patents, limited as indicated, may issue.

These regulations constitute a revision of Circular No. 71 of January 19, 1912 [40 L. D., 363], and its consolidation with Circulars No. 103, of April 30, 1912 [40 L. D., 584], and No. 117, of May 23, 1912 [41 L. D., 30], and supersede those circulars.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

[Form 4-008B.]

APPLICATION FOR SALE OF ISOLATED OR DISCONNECTED TRACTS.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,

-----,
-----, 19-----

To the Commissioner of the General Land Office:

-----, whose post-office address is -----
respectfully requests that the ----- of Section -----

Township -----, Range -----, be ordered into market and sold under the act of March 28, 1912 (37 Stat., 77), at public auction, the same having been subject to homestead entry for at least two years after the surrounding lands were entered, filed upon, or sold by the Government.

Applicant states that he is a -----

(Insert statement that affiant is a native-born or

naturalized citizen, as the case may be.)

citizen of the United States; that this land contains no salines, coal, or other minerals, and no stone except -----

-----; that there is no timber thereon except ----- trees of the ----- species, ranging from ----- inches to ----- feet in diameter, and aggregating about ----- feet stumpage measure, of the estimated value of \$-----; that the land is not occupied except by ----- of ----- post office, who occupies and uses it for the purpose of -----, but does not claim the right of occupancy under any of the public-land laws; that the land is chiefly valuable for -----, and that applicant desires to purchase same for his own individual use and actual occupation for the purpose of -----, and not for speculative purposes; that he has not heretofore purchased public lands sold as isolated tracts, the area of which when added to the area herein applied for will exceed approximately 160 acres. The lands heretofore purchased by him under said act are described as follows:

If this request is granted applicant agrees to have notice published at his expense in the newspaper designated by the register.

(Applicant will answer fully the following questions:)

Question 1. Are you the owner of land adjoining the tract above described? If so, describe the land by section, township, and range.

Answer -----

Question 2. To what use do you intend to put the isolated tract above described should you purchase same?

Answer -----

Question 3. If you are not the owner of adjoining land, do you intend to reside upon or cultivate the isolated tract?

Answer -----

Question 4. Have you been requested by anyone to apply for the ordering of the tract into market? If so, by whom?

Answer -----

Question 5. Are you acting as agent for any person or persons or directly or indirectly for or in behalf of any person other than yourself in making said application?

Answer -----

Question 6. Do you intend to appear at the sale of said tract if ordered, and bid for same?

Answer -----

Question 7. Have you any agreement or understanding, expressed or implied, with any other person or persons that you are to bid upon or purchase the land for them or in their behalf, or have you agreed to absent yourself from the sale or refrain from bidding so that they may acquire title to the land?

Answer -----

(Sign here with full Christian name.)

We are personally acquainted with the above-named applicant and the land described by him, and the statements hereinbefore made are true to the best of our knowledge and belief.

(Sign here with full Christian name.)

(Sign here with full Christian name.)

I certify that the foregoing application and corroborative statement were read to or by the above-named applicant and witnesses, in my presence, before affiants affixed their signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by -----); that I verily believe affiants to be credible persons, and the identical persons hereinbefore described; that said affidavits were duly subscribed and sworn to before me, at my office, at -----, this ----- day of -----, 19--

(Official designation of officer.)

[Forms 4-348e and 4-348d.]

NOTICE FOR PUBLICATION—ISOLATED TRACT.

PUBLIC LAND SALE.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,

-----,
-----, 19 .

Notice is hereby given that, as directed by the Commissioner of the General Land Office, under the provisions of the act of Congress approved March 28, 1912 (37 Stat., 77), pursuant to the application of-----
Serial No. ----, we will offer at public sale to the highest bidder, but at not less than \$----- per acre, at -- o'clock -- m., on the ----- day of-----
next, at this office, the following tract of land: -----

Any persons claiming adversely the above-described land are advised to file their claims or objections on or before the time designated for sale.

-----,
Register.

-----,
Receiver.

CHARLES T. HAWKES.

Decided December 30, 1912.

SOLDIERS' ADDITIONAL—ASSIGNMENT—INVALID PROBATE PROCEEDINGS.

An order by a probate court of the State of Missouri, directing an administrator to sell a soldiers' additional right, which does not prescribe the terms of sale, as required by section 117 of the Revised Statutes of that State, is,

under the construction placed upon said section by the Supreme Court of the State, null and void; and an assignment of the additional right based upon such order will not be recognized by the land department.

ADAMS, First Assistant Secretary:

August 30, 1906, Charles T. Hawkes, assignee of John Saling, administrator of the estate of Webster P. Saling, filed application to enter under sections 2306 and 2307, Revised Statutes, the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 4, T. 9 N., R. 65 W., 6th P. M., forty acres, Denver, Colorado, land district. It is alleged that Webster P. Saling served as a private in Company "D," 29th Regiment, Missouri, from September 6, 1862, to September 28, 1864, and further alleged that he made homestead entry No. 5434, on March 23, 1868, at the Buffalo, Missouri, land office, for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 21, T. 38 N., R. 15 W., 120 acres, which entry was canceled February 8, 1876, upon the expiration of the statutory period within which to submit proof.

The records of the land department show that such original entry made by Saling was in conflict as to the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, said Sec. 21, with patented cash entry No. 52410, made May 18, 1857, by Williamson Foster, and, therefore, appears that in the event said Saling performed the required military service and made homestead entry as alleged, he was entitled to an additional right of 80 acres. The records further show that on May 25, 1903, patent issued covering St. Cloud final certificate 11887, for 40 acres of land, based upon an assignment of 40 acres of the alleged soldiers' additional right of Webster P. Saling.

The land described in the present application was withdrawn October 15, 1906, from filing or entry under coal land laws, also from any other filing, entry or sale, November 7, 1906, modified to apply to coal entries merely December 17, 1906, and again withdrawn by executive order of July 7, 1910, under the act of June 25, 1910 (36 Stat., 847).

By the decision of the Commissioner of the General Land Office of January 3, 1912, the application of Hawkes was rejected as follows:

The petition for administration shows that John Saling, administrator, alleged that he was the son and sole heir of deceased. Thereupon letters of administration issued to him out of the Probate Court of the County of Camden, State of Missouri, without bond. It now appears from the report and affidavit submitted by the special agent that Webster P. Saling was twice married; that two children were born of the first marriage, namely Hulda Marl (whereabouts unknown) and Jennie Fisher (whereabouts unknown); and that of the second marriage there were two children, John Saling, administrator in this case, giving his address as Ira, Camden County, Missouri, and Amanda Wilson, of Montreal, Missouri. Amanda Wilson states in her affidavit:

"I have never assigned or acquiesced in a petition for an administration of my father's estate or made any assignment of his soldiers' additional right nor received any money for same."

Section 17, page 136, volume 1 of the Revised Statutes of Missouri (1899) provides:

"BOND.—The court, or judge or clerk in vacation, shall take a bond of the persons to whom letters of administration are granted, with two or more sufficient securities, resident in the county, to the State of Missouri, in such amount as the court or judge or clerk shall deem sufficient, not less than double the amount of the estate.

This bond is conditioned upon the faithful administration of said estate, and the payment and delivery of all money and property of said estate, and the performance of all other things touching said administration required by law or the order or decree of any court having jurisdiction.

In view of the fraudulent representations incorporated in the petition for administration, and of the failure of the court to require bond in the said case, as above stated, the assignment herein is adjudged to be invalid, and not to form a sufficient base upon which to predicate the application under consideration. Said application is accordingly hereby held for rejection, subject to the usual right of appeal.

From this decision appeal has been filed by the Holland Banking Company, of Springfield, Missouri, intervener, claiming right of appeal upon the ground that such banking company became the owner of said additional right of Saling by purchase from E. M. Robords, the immediate assignee of John Saling, administrator; that Robords has since died and his estate is insolvent, and if the application of Hawkes be denied, said banking company will be required to refund to Charles T. Hawkes the price received from him for said right, and will be unable to recover from the estate of said Robords, and will thereby suffer loss.

It is noticed that the right in question was transferred by the administrator directly to Charles T. Hawkes and that there is no record evidence that said banking company ever owned said right.

The order of sale of February 6, 1903, upon which the assignment by administrator is based, does not prescribe the terms of such sale as required by section 117, page 154, of the Revised Statutes of Missouri, of 1899, and is, therefore, null and void, and both it and the sale based thereon must be so held in a collateral proceeding where it is brought in question. See case of *Orchard v. Wright-Dalton-Bell-Anchor Store Co. et al.*, decided by the Supreme Court of Missouri, December 4, 1909, and rehearing denied February 12, 1910 (225 Missouri Supreme Courts Reports, 414; 125 S. W. Rep., 486).

It is, therefore, not necessary to pass upon the soundness of the reasons given by the Commissioner for his decision.

October 1, 1912, counsel for applicant were given opportunity to file memorandum and discussion of the case of *Orchard v. Wright-Dalton-Bell-Anchor Store Co. et al.*, *supra*, but no reply thereto having been received, action on this case will not be further delayed.

The decision appealed from is affirmed.

**RIGHT OF WAY—ELECTRICAL, TELEGRAPH, AND TELEPHONE
POLES AND LINES.****REGULATIONS.**

DEPARTMENT OF THE INTERIOR,
Washington, January 6, 1913.

GENERAL STATEMENT.

The act of March 4, 1911 (36 Stat., 1253-1254), provides, among other things, as follows:

That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone, and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided*, That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided*, That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law may obtain the benefit of this act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute.

For the purposes of this statute, national parks, Indian reservations, and reservations for water power sites, irrigation, classification of lands, or other public purposes, created under the withdrawal act of June 25, 1910 (36 Stat., 847), are considered to be under the jurisdiction of the Department of the Interior; military reservations under the jurisdiction of the War Department; and reservations created for the special occupancy, use, or control of other departments under the jurisdiction of such departments, respectively. The Attorney General on February 3, 1912, advised the Secretaries of the Interior and Agriculture that, for this purpose, national forests are under the jurisdiction of the Department of Agriculture (29 Op., 303).

It will be observed that this act, which authorizes the granting of easements for electrical power transmission, and telephone and telegraph lines for stated periods not to exceed 50 years, follows, as

closely as is possible in the accomplishment of its purposes, the language of the act of February 15, 1901 (31 Stat., 790), which authorizes mere revocable permits or licenses not only for such lines but also for other purposes. This act, therefore, merely authorizes additional or larger grants and does not modify or repeal the act of 1901, and should be construed and applied in harmony with it.

REGULATIONS.

REGULATION 1. Applications for rights of way for electric transmission lines under the said act of March 4, 1911, shall be presented and considered, except as herein otherwise provided, in the form and manner prescribed by the regulations issued August 24, 1912, and hereafter issued under the said act of February 15, 1901, in so far as the regulations issued under the act last aforesaid apply to electric transmission lines.

REG. 2. Applications for rights of way under the said act of March 4, 1911, for telephone and telegraph lines, shall be presented and considered, except as herein otherwise provided, in the form and manner prescribed by the regulations heretofore and hereafter issued under the said act of February 15, 1901, in so far as the regulations under the act last aforesaid apply to telephone and telegraph lines.

REG. 3. Applications for rights of way for electric transmission lines (hereinafter called "transmission line applications") are to be accompanied by:

(a) A description of the plant or plants which generate or will generate the power to be transmitted over such lines (hereinafter called "the connected generating plant," which term shall include all hydraulic, hydroelectric, and electric generating works), such description to be in sufficient detail to show, to the satisfaction of the Secretary of the Interior, the character, capacity, and location of such plant.

(b) A statement in detail to the Secretary of the Interior showing whether the connected generating plant is located, in whole or in part, on land owned or controlled by the United States, or on land not so owned and controlled, and whether any part of the connected generating plant or of the system of transmission and distribution in connection with such plant affects lands in reservations other than those under the jurisdiction of the Secretary of the Interior.

REG. 4. Rights of way granted under these regulations shall not be used for the transmission of any power generated otherwise than by and at "the connected generating plant" as above defined in regulation 3 until the Secretary of the Interior shall have given written authority for such use and then only on the terms and conditions expressed in such written authority.

REG. 5. Grants of rights of way shall be for a period of 50 years or for such less period as may be expressed in the grant in any particular case.

REG. 6. Before any right of way is granted the applicant shall execute and file in or in amendment of his application a statement of the particular terms and conditions upon which and subject to which the applicant asks to receive and agrees to take the grant of right of way, and the grant may be made subject to such terms and conditions, in which case such terms and conditions, together with these regulations, shall define and limit the grant, which shall be effective only if and in so far as it is subject to such terms, conditions, and regulations. Such original or amended application with the approval thereof by the Secretary of the Interior shall together constitute the grant and express the terms and conditions thereof, and the fact of such approval shall be noted on the application maps.

REG. 7. The grantee shall construct and thereafter during the term of the grant maintain and continuously operate for the transmission of electrical power the transmission lines for which right of way is granted except in so far as this condition may be temporarily waived by the Secretary of the Interior on a full showing to his satisfaction that such continuous operation is prevented by inevitable accidents or contingencies.

REG. 8. The grantee shall annually, on or before the 1st day of February next following the close of each calendar year of the period for which right of way is granted, pay, by certified check to the order of the Secretary of the Interior, the following rental charges: For all energy delivered during the preceding calendar year of the first decade after the date of the grant over the lines for which right of way is granted, a rental charge of 5 mills (\$0.005) per 1,000 kilowatt hours; and for all energy so delivered during the preceding calendar year of each decade after the first, a rental charge at such reasonable rate per 1,000 kilowatt hours so delivered as the Secretary of the Interior may fix before the beginning of such decade: *Provided*, That the burden of proving that any rate fixed by the said Secretary under this regulation is not reasonable shall be and remain upon the grantee: *Provided further*, That if no rate is so fixed for any particular decade, then the rental charge to be paid for each year of such decade shall be calculated and paid upon all energy delivered during such year over the lines for which right of way is granted at the rate per 1,000 kilowatt hours fixed for the preceding decade: *Provided further*, That any payment duly made by the grantee to the head or other officer of any department of the Federal Government having jurisdiction over national forests or other reservations of the United States occupied or used by any portion of the lines shown on the maps whereon approval of the grantee's application is noted under regu-

lation 6 hereof, such payment having been made as or on account of a rental charge for such occupancy and use for any calendar year during the period for which right of way is granted under these regulations, shall be credited upon the rental charge imposed under this regulation for the same year, but such credit shall in no case exceed the total of the rental charge so imposed for such year.

REG. 9. The grantee shall install at such places and maintain in good operating condition in such manner as shall be approved by the said Secretary accurate meters, or other devices approved by the said Secretary, adequate for the determination of the amount of electric energy delivered over the lines for which right of way is granted, or any part thereof, and shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the said Secretary, and shall make a return during January of each year under oath of such of the records of measurements for the year ending on December 31 preceding made by or in the possession of the grantee as may be required by the said Secretary.

REG. 10. The books and records of the grantee shall be open at all times to the inspection and examination of the said Secretary, or other officer or agent of the United States duly authorized to make such inspection and examination.

REG. 11. The lines constructed, maintained, and operated on the right of way granted shall not be owned, leased, trusteeed, possessed, or controlled by any device or in any manner so that they form part of or in any way effect any combination in the form of an unlawful trust, or form the subject of any unlawful contract or conspiracy to limit the output of electric energy, or in unlawful restraint of trade with foreign nations or between two or more States, or within any one State, in the generation, sale, or distribution of electric energy or in the transmission of communications by telephone or telegraph.

REG. 12. The grantee shall protect in a workmanlike manner according to the usual standards of safety for construction, operation, and maintenance in such cases all Government and other telephone, telegraph, and power-transmission lines at crossings of and at all places in proximity to the grantee's transmission, telephone, and telegraph lines on the right of way granted, and shall maintain his transmission, telephone, and telegraph lines thereon in such manner as not to menace life or property.

REG. 13. The grantee shall clear and keep clear all lands owned or controlled by the United States along the lines for which right of way is granted to such width and in such manner as the officer of the United States having supervision of such lands may direct.

REG. 14. The grantee shall, to the satisfaction of the officer last above described, dispose of all brush, refuse, or unused timber on lands owned or controlled by the United States caused by or left

from the construction and maintenance of the lines for which right of way is granted.

REG. 15. The grantee shall pay on demand, by certified check to the order of the Secretary of the Interior, the full value as fixed by the said Secretary for all timber cut, injured, or destroyed on lands owned or controlled by the United States in the construction, maintenance, and operation of the lines for which right of way is granted.

REG. 16. The grantee shall sell and deliver power to the United States and to the State within which are the lands servient to the right of way granted, or any part thereof, and to any or all municipal corporations of such State, when duly requested, at as low a rate as is given to any other purchaser for a like use at the same time and under similar conditions: *Provided*, That the grantee can furnish the same without diminishing the quantity of power sold before such request to any other customer by a binding contract of sale: *Provided further*, That nothing in this clause shall be construed to require the grantee to increase permanent works or install additional generating machinery or construct any transmission line or connection beyond the limits fixed by the statute for the right of way granted.

REG. 17. The grantee shall do everything reasonably possible, both independently and on request of the Secretary of the Interior or other duly authorized officer or agent of the United States, to prevent and suppress fires on or near the right of way granted.

REG. 18. The grantee shall maintain a system of accounting for his entire power business in such form as the Secretary of the Interior may prescribe and shall render annually such reports of the power business as the said Secretary may direct.

REG. 19. The grantee shall save harmless the United States against any liability for damages to life or property arising from the occupancy or use of the right of way granted.

REG. 20. The grantee shall not assign or transfer to any other person or corporation whatsoever the right of way granted, except with approval in writing first obtained from the Secretary of the Interior or other proper officer of the United States and upon terms and conditions prescribed in said written approval by such Secretary or other officer. The assignee or transferee under any such approval shall take and use the right of way subject to all the terms and conditions in these regulations together with the original approved application and grant set forth, and subject to such additional terms and conditions as may be provided by such written approval of the transfer.

REG. 21. In respect to the regulation, by any competent public authority, of the services to be rendered by the grantee or of the prices to be charged therefor, and in respect to any purchase or

taking over of the works or business of the grantee or any part thereof by the United States or by any State within which the works are situated or business carried on in whole or in part, or by any municipal corporation of such State, no value whatsoever shall at any time be assigned to or claimed for the right of way granted, nor shall said right of way or grant ever be estimated or considered as property upon which the grantee shall be entitled to earn or receive any return, income, price, or compensation whatsoever.

REG. 22. The grantee, with respect to service rendered and power delivered over the right of way granted (otherwise than in the performance of contracts upon the execution and performance of which the grant may be expressly conditioned under the provisions of regulation 6 hereof), and with respect to the prices charged and to be charged therefor, will comply with all such just and reasonable regulations as may be imposed by any duly constituted Federal, State, or other governmental authority having jurisdiction in the premises; and the grantee shall never, by reason of or in connection with the right of way granted, or otherwise, have, exercise, or claim any greater or other rights under contracts upon which the grant is so conditioned than could have rightfully been had, exercised, or claimed without such condition: *Provided*, That if, as to any conditions imposed upon the grantee by this paragraph, the regulations prescribed by the Federal Government, its officers or agents, are in conflict with the regulations prescribed by the State or any duly authorized agency thereof, compliance with the Federal regulations shall be deemed and taken to be a fulfillment of the requirements of this paragraph in so far as such conflict extends and no further.

REG. 23. Upon breach by the grantee of any of the terms or conditions set forth in these regulations or in the approved application or in the grant the United States may have and enforce appropriate remedy therefor by suit for specific performance, injunction, action for damages, or otherwise. And if any such breach shall be continued or repeated after 30 days' notice thereof given in behalf of the United States to the grantee the right of way granted, together with all rights thereunder and all rental charges and other moneys paid thereon, may be forfeited to the United States by a suit for that purpose in any court of competent jurisdiction.

Under the authority given by the above-quoted provision of the said act of March 4, 1911, the foregoing regulations are, on this sixth (6) day of January, 1913, hereby made and fixed with respect to grants of rights of way for the purposes in said provision set forth, over, across, and upon the public lands and reservations of the United States under the jurisdiction of the Department of the Interior.

WALTER L. FISHER,
Secretary of the Interior.

RIGHT OF WAY—POWER TRANSMISSION LINES—ACT MARCH 4, 1911.**GREAT FALLS POWER CO.**

On this 6th day of January, 1913, the Great Falls Power Co., a corporation organized under the laws of the State of Montana, and having its office and principal place of business in Butte, in said State, hereinafter called "the Power Company," having heretofore filed under the act of Congress approved March 4, 1911, chapter 238 (36 Stat., 1253-1254), in the United States land offices at Helena and Great Falls, in said State, its applications (designated as Helena 05776, 05777, 05778, 05779, 05780, and 05781; and Great Falls 05707) for right of way to the extent therein set forth for two transmission lines, and for a telephone line between said transmission lines, all substantially parallel, and shown on five maps filed in the said land office at Helena, and designated Helena 05777, 05778, 05779, 05780, and 05781, and on the three maps filed in the said land office at Great Falls as a part of the application designated Great Falls 05707, and all heretofore constructed over, across, and upon certain public lands and reservations of the United States under the jurisdiction of the Department of the Interior, which applications are now pending in the Department of the Interior, hereby renews and confirms its said applications, amending the same, however, so as to ask for such right of way for a period of 50 years over, across, and upon the said public lands and reservations to the extent of 20 feet on each side of the center of each of said lines shown on said maps, the said public lands and reservations to such extent being hereinafter called "the servient lands," and by way of further amendment the Power Company, in addition to the matters set forth in its said application, does, in consideration of the granting of the right of way hereby sought, hereby promise and agree for itself and its successors that upon and after such grant it will comply with the terms and conditions, and will fulfill and perform the promises hereinafter expressed.

(1) The Power Company will, during said period of 50 years, maintain and continuously operate for the transmission of electrical power and for telephone purposes, respectively, the lines for which right of way is hereby sought, except in so far as this promise and condition may be temporarily waived by the Secretary of the Interior upon a full showing to his satisfaction that such continuous operation is prevented by inevitable accidents or contingencies.

(2) The Power Company will, within 30 days after the granting of the right of way hereby sought, enter into and thereafter fully perform all its obligations under a contract with the Chicago, Mil-

waukee & Puget Sound Railway Co., a corporation organized under the laws of the State of Washington, and hereinafter called "the Railway Company," for the sale and delivery of electric power to the Railway Company, in form and substance as follows:

This agreement, made and entered into this — day of —, 1912, between the Great Falls Power Co., a corporation organized under the laws of the State of Montana, party of the first part, hereinafter for convenience referred to as the Power Company, and the Chicago, Milwaukee & Puget Sound Railway Co., a corporation organized under the laws of the State of Washington, for convenience hereinafter referred to as the Railway Company, party of the second part, witnesseth:

Whereas, the said Power Company is engaged in the business of generating electric power or energy from certain hydroelectric works within the State of Montana and selling and disposing of said power or energy; and

Whereas, the said Railway Company is engaged in operating a line of railway which lies partly within the State of Montana, and said Railway Company is desirous of installing equipment and apparatus which will enable the said Railway Company to operate certain portions of its said railway, hereinafter more particularly referred to, by means of electric power: Now, therefore, it is agreed between the parties hereto:

First. That the said Railway Company will, as soon as it is expedient for it so to do, begin, and that it will prior to the 1st day of January, 1918, complete, the installation and equipment of such apparatus, machinery, and motive power as may be necessary to enable the said Railway Company to operate its said line or railway from that certain station situated on said line of railway, in Musselshell County, known and designated as Harlowton, to that certain other station on said line of railway known as Deer Lodge, situated in Powell County, Mont., and that the said Railway Company will, on or before the said 1st day of January, 1918, receive and take from the said Power Company, and that the said Power Company will, as soon as said Railway Company shall be ready to receive and use said power, and thereafter continuously during the term of this contract, sell and deliver to the said Railway Company, in such manner and quantities and upon such terms and conditions as may be hereinafter stipulated, the electric power herein contracted for.

It is agreed that the Railway Company will give the Power Company two years' notice in writing of the date when the Railway Company will begin to use the power aforesaid, but it is understood and agreed that the said date when said power shall so begin to be used will not in any event be later than January 1, 1918.

Second. Subject to the reservations and in accordance with the provisions of this agreement as hereinafter stated, the Power Company hereby sells and agrees to deliver to the Railway Company and the Railway Company hereby buys and agrees to receive from the Power Company, electric power or energy for operating its railway equal to but not at any one time exceeding, except as provided for in articles 9, 10, 11, and 12, 10,000 kilowatts, for the full period of this agreement.

Third. The said power shall be delivered by the Power Company at its own sole cost, to the stations to be established and designated by the Railway Company between Deer Lodge and Harlowton, not exceeding 5 in number, in such amounts as may be required by the said Railway Company for the operation of its said line of railway during the term of this contract. Said

power to be delivered in the form of 3 phase, 60 cycle, alternating electric current at a potential of approximately 50,000 or 100,000 volts, as may be jointly agreed upon; provided, however, that the voltage at which said current shall be so delivered when once fixed shall not thereafter be changed during the life of this contract, except by mutual agreement of the parties hereto.

Fourth. The Power Company agrees that it will construct such suitable transmission lines as may be necessary in order to enable it to deliver, and that it will deliver, the power herein contracted for at its own cost, to the points, not exceeding five in number, as aforesaid, which points shall be located and designated by the said Railway Company between the points aforesaid. The said Railway Company shall receive the current at the points so designated by it at the terminals of air brake, high tension line switches, to be provided by the Power Company, and shall transform (by such apparatus as it may prefer) and conduct it along its said line of railway according to its requirements in such manner as it may see fit.

Fifth. It is agreed that the power herein contracted for shall be measured at each agreed point of delivery by curve-writing wattmeters operated synchronously and integrating watt-hour meters, or such approved instruments for the measurement of electric current as may be agreed upon by the parties hereto.

It is agreed that the measurement of the said power shall at all times be under the control and direction of the said Power Company, but that the said Railway Company and its duly designated agents shall, at all times, possess the right to make full inspection of the methods employed and the instruments and apparatus used for recording such measurements and to make any tests or examinations which may be necessary to enable the said Railway Company and its agents to determine the accuracy and reliability of such methods as may be pursued and such instruments and apparatus as may be used for the recording and measuring of the electric power furnished.

It is agreed that the Railway Company shall install in its substations such transforming or converting apparatus as, in its judgment, will best meet the requirements of its railway operations, provided that such apparatus shall comprise sufficient synchronous machines or other equivalent means to secure 80 per cent lagging or 80 per cent leading power factor of the apparatus affected. The Railway Company hereby grants to the Power Company the right to install and maintain at the sole cost of the Power Company, in the substations that may be established by the Railway Company, Tirrell regulators, or such other equivalent device as will operate the Railway Company's synchronous apparatus at any power factor between 80 per cent lagging and 80 per cent leading of the apparatus affected.

Sixth. It is agreed that the Railway Company will, and it does hereby, bind itself to give the Power Company 12 months' notice in writing of the location of the delivery points hereinbefore referred to. The Power Company agrees that it will, upon the date so fixed in said notice by the said Railway Company, and thereafter during the term of this contract, continue to either deliver, or hold in readiness for delivery, to said Railway Company such an amount of electric power as the said Railway Company shall be under obligation to receive and use under the terms of this contract.

Seventh. It is agreed that the Railway Company shall, and it does hereby, bind itself to pay to the Power Company, on the basis of measurements made at such points of delivery as are designated by the Railway Company, for the power or energy delivered to it under the terms and provisions of this contract at the rate of \$0.00536 (five hundred thirty-six thousandths of a cent) per kilowatt-hour, as shown by the instruments provided for in the fifth clause hereof; said payments to be made not later than the 15th day of each calendar month

for all power or energy either received and used by the Railway Company, or which the said company was under obligations to receive and use during the previous calendar month.

Eighth. It is agreed that, after a period terminating one year from the date when delivery of electric power shall begin under the terms of this contract, and during the remaining term of this contract, from the expiration of said period of one year, the said Railway Company shall be obliged, and does hereby agree, to pay to the said Power Company a minimum amount in monthly periods as aforesaid equivalent to 60 per cent of the amount which the said Railway Company would pay to the said Power Company, provided the full amount of power which the said Railway Company is under obligation to take and which the Power Company is under obligation to deliver had been actually delivered by the said Power Company to and received and used continuously by the said Railway Company, upon the basis of the rate above provided for.

Ninth. It is agreed that the Railway Company shall have the right, to be exercised at its option, such option to be exercised by it giving the Power Company written notice thereof, to receive in addition to the amount of power above provided for, an additional amount of not less than 4,000 kilowatts, nor more than 8,000 kilowatts, provided that said option to take and receive such additional amount of power is exercised by the Railway Company prior to January 1, 1923. It being understood and agreed that in the event of the said Railway Company so exercising said option that the amount of power which it will call for in addition to the original amount of 10,000 kilowatts shall become fixed, and thereafter the said Railway Company will be under obligation to take and receive, and the Power Company will be under obligation to sell and deliver, during the remaining term of this contract, the amount of power which shall be represented by the sum of 10,000 kilowatts plus the additional amount which the Railway Company shall have called for under the provisions of its said option.

Tenth. It is further agreed that at any time subsequent to January 1, 1923, and prior to January 1, 1928, the Railway Company shall have, and it is hereby given, the right, to be exercised at its option, in writing as aforesaid, to take and receive from the Power Company, and the Power Company shall be under obligation to sell and deliver to the said Railway Company an amount of power, in addition to the amounts previously provided for, of not less than 3,500 nor more than 7,000 kilowatts. Provided that if the said Railway Company shall at any time during the period between January 1, 1923, and January 1, 1928, so exercise its option for additional power, then in such event the Railway Company shall be under obligation to take and receive, during the remainder of the entire term of this contract, the amount of power represented by the amount which the Railway Company had been under obligation to take and receive, plus the amount of power which it shall have called for under the provisions of this option.

Eleventh. In the event of the Railway Company having failed to exercise its option for additional power provided for in article ninth hereof, it is understood and agreed that the Railway Company will thereafter possess no right to call for or receive additional power except as hereinafter provided for in article twelfth.

Twelfth. It is agreed that the Railway Company shall have, and it is hereby given, the right, to be exercised at its option, in writing as aforesaid, of taking power in addition to the 10,000 kilowatts herein contracted for, up to the full amount of 25,000 kilowatts at any time subsequent to January 1, 1918, and prior to January 1, 1928, provided it shall have called for under the provisions of this option at least 6,300 additional kilowatts prior to January 1, 1923.

It is agreed that the provisions set forth in article eighth hereof, with reference to the minimum payments which shall be made for power delivered under this contract, shall apply in like proportion to the amount which the Railway Company shall be under obligation to take after having exercised its right with reference to any of the options herein expressed, the same as said provision covers the rate of payment to be made upon the original amount herein contracted for.

Thirteenth. If the Railway Company shall be unable, on account of strikes, fires, floods, or other causes beyond its control, to receive or use the power herein provided for, or some part thereof, then it is understood and agreed that the Railway Company shall pay for so much power only as can be received and used by it during said period. If the Power Company, by reason of any unavoidable cause or accident, or because of strikes, floods, or fires, shall be unable at any time during this contract to make delivery of power as herein agreed, then the said Power Company shall not be liable in any sum for such failure so caused to deliver power during such period.

In the event of this contract being suspended on account of any of the reasons hereinbefore enumerated, it is agreed that the period of such suspension shall be added to the term of the contract herein provided for, and the contract and all of its provisions shall be extended for such period equal to the period of suspension.

It is further understood and agreed that if the Power Company shall at any time be permanently enjoined, restrained or prevented by Federal or State interference, or by final judgment or decree of any court of competent jurisdiction, from maintaining transmission lines or other works necessary to enable it to perform its engagements hereunder, the Power Company shall thereupon be relieved from any obligation thereafter to furnish or deliver power under the terms hereof, and the Railway Company shall likewise be relieved from any obligation thereafter to take or pay for such power.

Fourteenth. It is agreed that the Railway Company shall have a preferential right to receive power from the Power Company, and that up to the full amount which it shall have contracted to receive and use the Power Company will sell and deliver said power before filling any other contract.

It is agreed that the Power Company shall hold itself in readiness to furnish all of the power herein contracted for up to the maximum amount that the Railway Company shall be entitled to receive continuously so that the Railway Company shall during the full period of this contract, except as otherwise herein provided for, be able to draw upon said Power Company for the full amount of power which it shall be entitled to receive at such times as may be necessary to meet the requirements of its business.

Fifteenth. It is agreed that the Power Company shall have, and it is hereby granted, subject to the right of the Railway Company to prescribe such reasonable limitations as may be deemed by it advisable to insure the safety of its business and to provide for the safe conduct of the current or energy transmitted, as hereinafter provided, the right to construct transmission lines over, across, along, and upon the right of way of the said Railway Company wherever it may see fit, for the purpose of transmitting and conducting electrical power or energy, for purposes other than to supply said Railway Company with power, provided, however, that the location of poles and wires shall be designated by the Railway Company, and that notwithstanding such designation, if the Railway Company afterwards requires the use of the right of way or station grounds, or any part thereof, for any purpose, the Power Company will remove, at its own sole expense, on 60 days' notice, its poles and wires to another location on the Railway Company's property, if such location can be furnished by the Rail-

way Company, or if not, to a location outside and off the Railway Company's property, and that the said Power Company shall so conduct such electrical power or energy as will cause no interference, damage, or injury to the said Railway Company or interfere in any manner with any of the operations of said Railway Company, or the telegraph or telephone service along its line of railway. In case the Power Company extends its transmission lines along or parallel to the Railway Company's right of way, then in that event the Power Company will deliver power and hereby agrees to deliver power at such other points along the railway line as best serves the purpose of the Railway Company. The Power Company further agrees to purchase at a mutually agreed upon price and operate at its own expense such transmission lines as may have been built by the Railway Company on its right of way as come within the area of such extension of the Power Company's transmission lines.

Sixteenth. It is agreed that the Railway Company shall have the right to receive and use the power or current herein provided for in the operation of its railway and for such other purposes as it may require electric power or current incidental to the operation of its said railways; but that it shall have no right, and it hereby agrees that it will not sell or dispose of any of the electric power which it is entitled to receive and use under the terms of this contract to any other person or persons or corporations whatsoever, and that it will not, during the life of this contract, use or apply the said electric power or current to any use or purpose other than in connection with the operation of its said line of railway, shops, stations, coaling stations, ice houses, and other railway uses, either power or lighting.

Seventeenth. Any and all questions which shall or may arise touching this agreement or the construction or performance of any provision thereof shall be submitted to the decision of three disinterested persons to be chosen as follows:

The Railway Company shall select one and the Power Company shall select one, and the two thus chosen shall select the third, and the persons thus chosen, after a full hearing to both parties and full examination of the matter in dispute, shall determine the same in writing, and the decision of the majority of the three persons thus chosen shall be final. If either party shall neglect or refuse to appoint an arbitrator on its own part, then 10 days after receiving written notice from the other of its appointment of an arbitrator on its part, the arbitrator so appointed by the party giving such notice may select a disinterested person to act as an arbitrator for and on account of the party so notified and refusing or neglecting to appoint an arbitrator on its part, and the two thus chosen shall select a third. If the two so chosen in either of the methods above provided shall be unable to agree upon a third arbitrator, or shall fail to agree upon a third arbitrator, and such inability shall continue for a period of 15 days, then in that event the parties hereto shall and may notify the chief justice of the Supreme Court of the State of Montana of such fact, and he shall and may appoint said third arbitrator. The decision and award of the arbitrators as herein provided, or any two of them, shall be binding and conclusive upon the parties hereto with respect to the matters so submitted to and decided by said arbitrators.

If any arbitrator appointed by either of the parties hereto shall neglect or fail to act, notice of such failure shall be served upon the party appointing such arbitrator by the other party, and in case such party shall fail to appoint another arbitrator, or shall fail to cause the arbitrator first appointed to act, and such failure shall continue for a period of 10 days, then the arbitrator appointed by the other party may select a disinterested person to act as an arbitrator for and on account of the other party, and the two thus chosen shall

select a third, and the decision and award of such arbitrators, or any two of them, shall be binding and conclusive upon said parties hereto with respect to the matter so submitted and decided by said arbitrators.

The award and decision of the arbitrators under the provisions hereof shall be served by them, or some one for them, upon the parties within 15 days after the time when such arbitrators shall make their award.

It is further mutually agreed that any difference which may arise as to the construction of or the transaction of any business under this agreement by the parties hereto shall not interrupt the transaction of such business nor the operation of trains, nor the delivery of power, but all said business of either party and operations of trains and the delivery of power shall continue in the same manner in which the same shall have been transacted prior to the arising of such difference until the matter of difference shall have been fully determined by the arbitrators as aforesaid, and thereupon such payments or restoration shall be made by the respective parties to the other as may be required by the decision or award of said arbitrators.

In case any charge made or item embraced in any statement rendered by either party to the other shall be contested and submitted to arbitration under the terms hereof, and an award shall be made by said arbitrators requiring payment thereof or any part thereof, or in case any failure to comply with any other covenant or agreement in this contract is alleged by either party against the other, and the same is submitted to arbitration as herein provided and decided by said board of arbitration, then the losing party shall pay the amount of such award or comply with the terms and requirements thereof; and if it fails so to do, and such failure shall continue for a period of 30 days after the service of the award, then and in that event the prevailing party shall have the right to terminate this agreement according to the terms and provisions thereof for and on account of such failure and default.

Eighteenth. It is agreed that this contract shall be, and it is hereby made, for the full term and period of 99 years from and after this date.

Nineteenth. It is agreed that the terms and provisions of this contract shall inure to the benefit of and its obligations shall be binding upon the successors, grantees, or assigns of the respective parties hereto.

In witness whereof, the respective parties have caused these presents to be executed in duplicate by their proper officers, thereunto duly authorized, the day and year first above written.

GREAT FALLS POWER CO.,
By _____,
Its ——— President.

Attest:

Its ——— Secretary.
CHICAGO, MILWAUKEE & PUGET SOUND RY. CO.,
By _____,
Its ——— President.

Attest:

Its ——— Secretary.

Said contract having been heretofore tentatively agreed upon by the two said companies: *Provided*, First. That nothing contained either in this application, or in the grant hereby sought, or in said contract and especially the section thereof designated "eighteenth," shall be construed to give to the Power Company any right, easement,

claim, license, or permission to hold, occupy, or use the servient lands for the operation or maintenance of electrical transmission lines or for any other purpose whatsoever after the expiration of 50 years from the date of the grant hereby sought; and the Power Company shall and will, upon the expiration of said 50 years, be deemed and taken to be permanently prevented by Federal interference from maintaining transmission lines on the servient lands and thereby relieved under the last paragraph of the section of said contract designated "thirteenth" from any obligation to furnish and deliver power under the terms of said contract unless and until it shall have obtained from the United States the right to occupy the servient lands for the maintenance of such lines: *Provided*, Second. That nothing in this application or in the grant hereby sought, or in said contract and especially the section thereof designated "fifteenth," shall be construed to give to the Power Company or the Railway Company any right whatsoever to occupy or use lands of the United States within the railway right of way for any other than railway purposes nor as expressing the acquiescence or consent of the United States or of the Secretary of the Interior in or to any such occupancy or use; but the Power Company shall and will make due application to the Secretary of the Interior, or other proper officer or agent of the United States, for the right to occupy and use such lands for other than railway purposes, and especially for any purpose other than to supply the Railway Company with power, and the Power Company will abide by the decision and action of the said Secretary or other officer upon such application.

(3) The Power Company will never, by reason of or in connection with the right of way hereby sought or otherwise, have, exercise, or claim any greater or other rights under said contract, with respect to prices to be paid for power by said Railway Company, than it could have rightfully had, exercised, or claimed if the right of way hereby sought had been sought and granted without any mention of or reference to said contract.

(4) The Power Company will pay annually, on or before February 1 in each year, by certified check to the order of the Secretary of the Interior, a rental charge at the rate of 5 mills (\$0.005) per thousand kilowatt hours for all energy delivered by it over the lines for which right of way is hereby sought during the preceding calendar year of the decade beginning on January 1, 1913, whether said delivery is made to the Railway Company under the said contract or otherwise or to other takers; and during each decade thereafter a rental charge at such reasonable rate per thousand kilowatt hours so delivered to said Railway Company and to said other takers as the Secretary of the Interior may fix before the beginning of each decade for such deliveries, respectively: *Provided*, That the burden of proving that

any rate fixed by the said Secretary under this paragraph is unreasonable shall be and remain upon the Power Company: *Provided further*, That if no rate is so fixed for any particular decade, then the rental charge to be paid for each year of such decade shall be calculated upon all energy delivered during the preceding calendar year over the lines for which right of way is hereby sought at the rate per thousand kilowatt hours fixed for the preceding decade: *Provided further*, That any payment duly made by the Power Company to the head or other officer of any department of the Federal Government having jurisdiction over National Forests or other reservations of the United States occupied or used by any portion of the lines for which right of way is hereby sought, such payment having been made as or on account of a rental charge for such occupancy and use for any calendar year during the said period of 50 years for which right of way is hereby asked, shall be credited upon the rental charge imposed under this paragraph for the same year, but such credit shall in no case exceed the total of the rental charge so imposed for such year.

(5) The Power Company will install at such places and maintain in good operating condition in such manner as shall be approved by the said Secretary accurate meters, or other devices approved by the said Secretary, adequate for the determination of the amount of electric energy delivered over the lines for which right of way is hereby sought, or any part thereof, to the said Railway Company, and to all other takers, respectively, and will keep accurate and sufficient record of the foregoing determinations to the satisfaction of the Secretary, and will make a return during January of each year, under oath, of such of the records of measurements for the year ending on December 31 preceding, made by or in the possession of the Power Company as may be required by the said Secretary.

(6) The books and records of the Power Company will be open at all times to the inspection and examination of the said Secretary, or other officer or agent of the United States duly authorized to make such inspection and examination.

(7) The lines constructed, maintained, and operated on the servient lands will not be owned, leased, trusted, possessed, or controlled by any device or in any manner so that they form part of or in any way effect any combination in the form of an unlawful trust, or form the subject of any unlawful contract or conspiracy to limit the output of electric energy, or in unlawful restraint of trade with foreign nations or between two or more States, or within any one State in the generation, sale, or distribution of electric energy or in the transmission of communications by telephone.

(8) The Power Company will protect in a workmanlike manner, according to the usual standards of safety for construction, operation,

and maintenance in such cases, all Government and other telephone, telegraph, and power transmission lines at crossings of and at all places in proximity to the Power Company's transmission lines, and will maintain its transmission and telephone lines in such manner as not to menace life or property.

(9) The Power Company will clear and keep clear all lands owned or controlled by the United States along the lines for which right of way is hereby sought to such width and in such manner as the officer of the United States having supervision of such lands may direct.

(10) The Power Company will, to the satisfaction of the officer last above described, dispose of all brush, refuse, or unused timber on lands owned or controlled by the United States caused by or left from the construction and maintenance of its lines for which right of way is hereby sought.

(11) The Power Company will pay the full value as fixed by the said Secretary for all timber cut, injured, or destroyed on lands owned or controlled by the United States in the construction, maintenance, and operation of the lines for which right of way is hereby sought.

(12) The Power Company will sell and deliver power to the United States and to the State of Montana and to any or all municipal corporations of said State, when requested, at as low a rate as is given to any other purchaser for a like use at the same time and under similar conditions: *Provided*, That the Power Company can furnish the same without diminishing the quantity of power sold before such request to any other customer by a binding contract of sale: *Provided further*, That nothing in this clause shall be construed to require the Power Company to increase permanent works or install additional generating machinery or construct any transmission line or connection beyond the limits of the servient lands.

(13) The Power Company will do everything reasonably within its power, both independently and on request of the Secretary of the Interior or other duly authorized officer or agent of the United States, to prevent and suppress fires on or near the servient lands.

(14) The Power Company will maintain a system of accounting of its entire power business in such form as the Secretary of the Interior may prescribe and will render annually such reports of the power business as the said Secretary may direct.

(15) The Power Company will indemnify the United States against any liability for damages to life or property arising from its occupancy or use of the servient lands.

(16) The Power Company with respect to service rendered and power delivered to other takers than the railway company over its lines for which right of way is hereby sought and with respect to the prices charged and to be charged therefor will comply with all

such just and reasonable regulations as may be imposed by any duly constituted Federal, State, or other governmental authority having jurisdiction in the premises: *Provided*, That if, as to any matters promised by the Power Company in this paragraph, the regulations prescribed by the Federal Government, its officers or agents, are in conflict with the regulations prescribed by the State or any duly authorized agency thereof, compliance with the Federal regulations shall be deemed and taken to be a fulfillment of the promises of this paragraph in so far as such conflict extends and no further.

(17) The Power Company will not assign or transfer the right of way hereby sought to any other person or corporation whatsoever, except with approval in writing first obtained from the Secretary of the Interior or other proper officer of the United States, and upon conditions prescribed in said written approval by him. The assignee or transferee under any such approval shall take and use the right of way subject to all the terms, conditions, and promises in this application set forth, and subject to such additional terms, conditions, and promises as may be imposed and exacted by such written approval.

(18) In respect to the regulation, by any competent public authority, of the services to be rendered by the Power Company or of the prices to be charged therefor, and in respect to any purchase or taking over of the works or business of the Power Company or any part thereof by the United States or by the State of Montana, or by any municipal corporation of said State, no value whatsoever shall at any time be assigned to or claimed for the right of way hereby sought, nor shall said right of way or the grant hereby applied for ever be estimated or considered as property upon which the Power Company shall be entitled to earn or receive any return, income, price, or compensation whatsoever.

(19) Upon breach by the Power Company of any of the terms, conditions, or promises in this application set forth the United States may have and enforce appropriate remedy therefor by specific performance, injunction, action for damages, or otherwise in a suit instituted by the Attorney General for that purpose in any court of competent jurisdiction. And if any such breach shall be continued or repeated after 30 days' notice thereof given in behalf of the United States to the Power Company, the right of way hereby sought, together with all rights thereunder and all moneys paid thereon, may be forfeited to the United States by a suit brought on request of the Secretary of the Interior by the Attorney General for that purpose in any court of competent jurisdiction.

In witness whereof said Great Falls Power Co. has caused these presents to be executed, in duplicate, by its president and agent and

its corporate seal to be hereto affixed by its secretary, both thereunto duly authorized, the day and year first above written.

GREAT FALLS POWER CO.,
By JOHN D. RYAN, *President*.

Attest:

P. E. BISLAND,
Secretary of the Great Falls Power Co.

(Corporate seal.)

In pursuance of the provisions of the act of Congress approved March 4, 1911, chapter 238 (vol. 36, Stat. L., pp. 1253 and 1254), and in pursuance of general regulations thereunder fixed by the Secretary of the Interior, and in consideration of the promises by the said Great Falls Power Co. made and set forth in the foregoing application, the rights of way over, upon, and across the public lands and reservations of the United States under the jurisdiction of the Department of the Interior, sought by and described in the foregoing application, are hereby granted for the period of 50 years from this 7th day of January, 1913, subject, however, to the general regulations under the said act fixed by the Secretary of the Interior and to the terms and conditions in said application set forth, such grant, subject to said regulations, terms, and conditions, having been found by me to be not incompatible with the public interest. This grant does not affect national forests or other reservations not under the jurisdiction of the Department of the Interior.

In witness whereof I have subscribed these presents, in duplicate, the day and year last above written.

WALTER L. FISHER,
Secretary of the Interior and
Head of the Department of the Interior.

RIGHT OF WAY—ELECTRICAL POWER TRANSMISSION LINES.

GREAT FALLS POWER CO.

Whereas, the Secretary of the Interior did, on January 7, 1913 [41 L. D., 460], grant under the act of Congress approved March 4, 1911, chapter 238 (36 Stat., 1253-4), and the regulations of the Secretary of the Interior approved January 6, 1913 [41 L. D., 454], thereunder, to the Great Falls Power Company, a corporation organized under the laws of the State of Montana and having its office and principal place of business in Butte, in said State, a right of way for two transmission lines and a telephone line over, across, and upon certain public lands and reservations of the United States under the

jurisdiction of the Department of the Interior, which said right of way is more particularly described in and subject to the terms and conditions in said grant and in the original and amended application therefor set forth; and

Whereas, the said corporation has, under date of January 27, 1913, applied for written authority under regulation No. 4 of the said regulations approved January 6, 1913, to use the said right of way for the transmission of power generated at certain additional plants other than the connected generating plant described in the said corporation's original application for said grant, which additional generating plants are described in the said application for written authority dated January 27, 1913, and in an amendment thereof and in papers supplemental thereto transmitted to the Secretary of the Interior under date of February 25, 1913; and

Whereas, I have found that the granting of such written authority, subject to the general regulations under the said act of Congress and to the terms and conditions hereinafter set forth, is not incompatible with the public interest;

Now therefore, authority is hereby given to the said Great Falls Power Company to transmit over said right of way power from the developments "Great Falls Power C" and "Great Falls Power D" and "Black Eagle Falls," when completed, in consideration of and subject to the compliance by the said company with the terms and conditions hereinafter expressed and numbered (1), (2), (3), and (4); and to interchange power with the Montana Power Company and to transmit over said right of way power generated by the developments of the Montana Power Company designated "Madison No. 1" and "Madison No. 2" and "Big Hole" and "Canyon Ferry" and "Hauser Lake" and "Holter" (in course of development) in consideration of and subject to the compliance by the said Great Falls Power Company with the terms and conditions hereinafter expressed and numbered (1), (2), (3), (4), and (5):

(1) The authority hereby given is limited to the term of the said grant made January 7, 1913, and shall cease and determine fifty years from the date last aforesaid.

(2) This grant of authority shall be deemed and taken to be an amendment of said grant of January 7, 1913, and shall at all times be subject to each and all terms and conditions of the grant last aforesaid, and subject to the general regulations under the said act of Congress fixed by the Secretary of the Interior.

(3) In the use, enjoyment, and exercise of the authority hereby granted the said corporation shall not occupy or use any of the lands of the United States other than those described in and servient to the said grant dated January 7, 1913.

(4) No power generated or transmitted by works or structures for which public lands or reservations of the United States are occupied or used without due legal authorization shall be transmitted over said right of way under the authority hereby given.

(5) Interchange of power with the Montana Power Company and transmission of power generated by the said developments of the Montana Power Company (a) shall be for the purpose of aiding temporarily the said Great Falls Power Company to fulfill its contractual obligations for the delivery of power in time of seasonal shortage of water supply, in case of unavoidable accident, and during the construction of its power developments hereinbefore mentioned; and (b) shall be accomplished only in conformity with reasonable rates for power and other reasonable terms and conditions to be set forth in a written agreement entered into in good faith by the said Great Falls Power Company and Montana Power Company, a certified copy of which agreement shall be filed with the Secretary of the Interior; and (c) shall at no time increase the total amount of power transmitted over the whole or any part of said right of way to an amount greater than the aggregate power capacity, constructed and installed and in active progress of construction or installation, of the developments of the Great Falls Power Company designated "Rainbow" and "Great Falls Power C" and "Great Falls Power D" and "Black Eagle Falls."

In witness whereof, I have subscribed these presents, in duplicate, on this 26th day of February, 1913.

WALTER L. FISHER,
Secretary of the Interior
and Head of the Department of the Interior.

RECLAMATION—TRUCKEE-CARSON PROJECT—BUILDING CHARGE.

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,
Washington, January 17, 1913.

On November 14, 1912, an order was issued under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), for the relief of the settlers under the Truckee-Carson Project, Nevada, by requiring only partial payment of the instalment for building charge due December 1, 1911, the payment of the balance to be made December 1, 1913. Such order is hereby amended so as to read as follows:

The portion of the instalment for building the irrigation system, due December 1, 1911, on any water-right application, is hereby

reduced to fifty cents per acre of irrigable land, and the balance of said portion of instalment due December 1, 1911, amounting to \$1.70 per acre for lands entitled to the \$22 rate, or \$2.50 per acre for lands to which the \$30 rate is applicable, shall be divided into two equal parts and added to the ninth and tenth instalments respectively: *Provided, however*, That this notice shall not apply to entries or water-right applications on which two or more instalments of the building charge remained due and unpaid on November 30, 1912, or upon which any portion of an instalment for operation and maintenance remained due and unpaid on November 30, 1912.

SAMUEL ADAMS,
First Assistant Secretary of the Interior.

RECLAMATION—SHOSHONE PROJECT—INSTALMENTS.

ORDER.

DEPARTMENT OF THE INTERIOR,
Washington, January 17, 1913.

Whereas, by the fourth paragraph of section 2 of the public notice dated May 8, 1909, for the second unit of the Shoshone project, Wyoming, provision is made for the accumulation of the portions of the instalments of charges account of operation and maintenance under the following terms and conditions:

Entries and water-right applications filed in 1910 and subsequent years must, in addition to one full instalment of the charges, be accompanied by an amount equal to the portions of the instalments of prior years for operation and maintenance, which would have been payable had the entry and application been made in 1909.

Whereas, similar provision for the accumulation of the portions of the instalments of charges account of operation and maintenance is contained in section 7 of the public notice issued May 20, 1911 [41 L. D., 122], for lands within the third unit of said project; and

Whereas, the public notice issued February 9, 1912 [41 L. D., 422], for the relief of parties who had filed entries or water-right applications under the previous public notices, provides that upon the filing by such parties of water-right applications subject to the provisions of the said public notice of February 9, 1912, as amendatory to water-right applications theretofore filed, the portions of instalments for operation and maintenance shall not accumulate; and

Whereas, such water-right applications as have been continued under the public notices of May 8, 1909, and May 20, 1911, pursuant to section 1 of the public notice of February 9, 1912, are subject to

the accumulation of the portions of the instalments of charges account of operation and maintenance; and

Whereas, it is desired to place all water-right applicants for lands on the project on an equitable basis;

Now, therefore, by virtue of the authority given me by the act of Congress approved June 17, 1902 (32 Stat., 388), commonly called the Reclamation Act, and by acts supplementary thereto and amendatory thereof, it is hereby ordered:

That the fourth paragraph of section 2 of the public notice of May 8, 1909, and section 7 of the public notice of May 20, 1911, are hereby revoked, and all water-right applicants who have elected to continue their applications under the public notices of May 8, 1909, or May 20, 1911, pursuant to section 1 of the public notice of February 9, 1912, as well as all applicants who have made water-right applications under the terms of the public notice of February 9, 1912, as amendatory to water-right applications theretofore filed, who have made payment of accumulated portions of instalments of charges account of operation and maintenance shall be allowed due credit for any such payments made upon the portions of subsequent instalments of the charges account of operation and maintenance.

SAMUEL ADAMS,
First Assistant Secretary of the Interior.

CERTIFIED COPIES OF RECORDS—ACT OF AUGUST 24, 1912.

DEPARTMENT OF THE INTERIOR,
Washington, January 23, 1913.

INSTRUCTIONS.

TO THE BUREAUS AND OFFICERS OF THE INTERIOR DEPARTMENT:

The above-entitled act, authorizing the furnishing of copies of official books, records, papers, documents, maps, plats, or diagrams within the custody and charge of the Secretary of the Interior, the head of any bureau, office, or institution, or any officer of the Department, provides that authenticated copies of any rules, regulations, or instructions printed by the United States for gratuitous distribution shall be furnished without any charge save twenty-five cents for each certificate of verification. For written copies a charge of fifteen cents for each hundred words therein, in addition to the sum of twenty-five cents for each certificate of verification and seal is authorized. In preparing certified copies of printed circulars, forms, or other papers where the printed forms and papers are in stock or

on file in the Department, bureau, or office, and where the preparation of the certified copy necessitates the filling in of but few words in longhand or in typewriting, you will make no charge for the printed words contained in the form or paper, but will charge at the rate of fifteen cents for each hundred words filled in in such form or paper in addition to the sum of twenty-five cents for each certificate of verification and seal. Where, however, as in the case of final-proof forms pertaining to public lands, a major or considerable portion of the form is required to be filled in in typewriting or longhand, the printed portions of the form or paper being largely in the nature of questions and the typewriting or longhand portions thereof answers or proofs made responsive thereto, you will exact a charge of fifteen cents per hundred words for all words in the copy furnished, including both the printed and typewritten or longhand written words.

Very respectfully,

SAMUEL ADAMS,
First Assistant Secretary.

[PUBLIC—No. 317.]

An Act To make uniform charges for furnishing copies of records of the Department of the Interior and of its several bureaus.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior, the head of any bureau, office, or institution, or any officer of that department, may, when not prejudicial to the interests of the Government, furnish authenticated or unauthenticated copies of any official books, records, papers, documents, maps, plats, or diagrams within his custody, and charge therefor the following fees: For all written copies, at the rate of fifteen cents for each hundred words therein; for each photolithographic copy, twenty-five cents where such copies are authorized by law; for photographic copies, fifteen cents for each sheet; and for tracings or blue prints the cost of the production thereof to be determined by the officer furnishing such copies, and in addition to these fees the sum of twenty-five cents shall be charged for each certificate of verification and the seal attached to authenticated copies: *Provided*, That there shall be no charge for the making or verification of copies required for official use by the officers of any branch of the Government: *Provided further*, That only a charge of twenty-five cents shall be made for furnishing authenticated copies of any rules, regulations, or instructions printed by the Government for gratuitous distribution.

SEC. 2. That nothing in this act shall be construed to limit or restrict in any manner the authority of the Secretary of the Interior to prescribe such rules and regulations as he may deem proper governing the inspection of the records of said department and its various bureaus by the general public, and any person having any particular interest in any of such records may be permitted to take copies of such records under such rules and regulations as may be prescribed by the Secretary of the Interior.

SEC. 3. That all authenticated copies furnished under this act shall be admitted in evidence equally with the originals thereof.

SEC. 4. That all officers who furnish authenticated copies under this act shall attest their authentication by the use of an official seal, which is hereby authorized for that purpose.

SEC. 5. That the act of Congress approved April nineteenth, nineteen hundred and four, chapter thirteen hundred and ninety-six, be, and the same is hereby, repealed; but nothing in this act shall be so construed as to repeal the provisions of sections four hundred and ninety to four hundred and ninety-three, inclusive, and forty-nine hundred and thirty-four of the Revised Statutes, fixing the rates for patent fees; or the act approved March third, eighteen hundred and ninety-one, chapter five hundred and forty-one, fixing a rate for certifying printed copies of specifications and drawings of patents; or of section fourteen of the act of February twentieth, nineteen hundred and five, chapter five hundred and ninety-two, to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same; nor shall anything in this act be construed to repeal any of the provisions of section eight of the act approved April twenty-sixth, nineteen hundred and six, chapter eighteen hundred and seventy-six, authorizing the officer having charge of the custody of any records pertaining to the enrollment of members of the Five Civilized Tribes of Indians to furnish certified copies of such records and charge for that service such fees as the Secretary of the Interior may prescribe; nor shall anything herein contained prevent the Secretary of the Interior, under his general power of supervision over Indian affairs, from prescribing such charges or fees for furnishing certified copies of the records of any Indian agency or Indian school as he may deem proper; and the said Secretary is hereby authorized to charge a fee of twenty-five cents for each certified copy issued by him as to the official character of any officer of his department.

SEC. 6. That all sums received under the provisions of this act shall be deposited in the Treasury to the credit of miscellaneous receipts.

Approved, August 24, 1912.

LEWIS P. HUNT.

Decided January 29, 1913.

ALASKAN LANDS—SOLDIERS ADDITIONAL—SECTION 10, ACT MAY 14, 1898.

An occupant of public lands in the District of Alaska entitled under section 10 of the act of May 14, 1898, to purchase not exceeding eighty acres thereof at the rate of \$2.50 per acre, may, upon furnishing the specific proof demanded by that section, acquire title through soldiers' additional entry instead of by making cash payment.

ADAMS, *First Assistant Secretary*:

Lewis P. Hunt has filed a motion for rehearing of departmental decision, dated April 1, 1911, which affirmed the action of the Commissioner of the General Land Office in holding for cancellation his soldiers' additional entry, based upon the certified soldiers' additional right of Thomas McCormack, for 79.089 acres of land situated on Kosciusko Island, Juneau, Alaska, land district.

It is shown by the record that the survey of this tract described as "the survey of the soldiers' additional homestead claim, known as

survey No. 215, claimed by the Alaska Fish and Lumber Company," was made in December, 1901. The land was withdrawn for the Alexander Archipelago Forest Reserve by proclamation, August 20, 1902 (32 Stat., 2025), which provided that the withdrawal "shall not be so construed as to deprive any person of any valid right . . . acquired under any act of Congress relating to the Territory of Alaska." The plat of survey was received in the office of the surveyor general for Alaska, on December 1, 1902, was approved by him on May 8, 1905, and was filed in the local land office on May 10, 1905. The name of the forest reserve was changed to Alexander Archipelago National Forest by proclamation of July 20, 1907 (35 Stat., 2148), and to Tongass National Forest by the proclamation of February 16, 1909 (35 Stat., 2226). In both of said proclamations the proviso to said proclamation of August 20, 1902, was repeated.

It further appears that bankruptcy proceedings were instituted against said Alaska Fish and Lumber Company in the District Court of the United States for Minnesota and that the trustee in bankruptcy sold, under order of court, all the property of the company, including these lands, to I. N. Griffith who, in turn, conveyed the same to the claimant, Hunt.

It is shown by the surveyor's notes that all the timber on this tract had been cut at the date of the survey; that the Alaska Fish and Lumber Company had, at that time, spent \$20,000 in improvements thereon and, it is alleged by Hunt, that the company thereafter placed other improvements on the land to the value of \$100,000; that he had been in the management of the industries there since 1905 and has placed thereon further improvements, making the aggregate value of the property \$150,000, relying upon his supposed valid claim.

The soldiers' additional application in this case was filed by Hunt on September 19, 1908, and final certificate thereon was issued on July 29, 1910, after report from the Chief of Field Division that there was no protest pending against the entry.

Section 10 of the act of May 14, 1898 (30 Stat., 409), provides as follows:

That any citizen of the United States twenty-one years of age, or any association of such citizens, or any corporation incorporated under the laws of the United States or of any State or Territory now authorized by law to hold lands in the Territories, hereafter in the possession of and occupying public lands in the District of Alaska in good faith for purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding eighty acres of such land for any one person, association, or corporation at two dollars and fifty cents per acre, upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry.

If the land under consideration was occupied by the entryman or his predecessors in interest for purposes of trade, manufacture, or

other productive industry at the date of the withdrawal of August 20, 1902, as is suggested by the record, and there has been no unnecessary delay in the assertion of the claim before the land department, the withdrawal for forestry purposes has not attached, because of the proviso hereinbefore quoted in the several proclamations creating the national forest; and, if the withdrawal has not attached, the Department is of opinion that Hunt may, at his option, acquire title through a soldiers' additional entry rather than by the payment of \$2.50 per acre, as provided in said act of May 14, 1898, *supra*. However, the specific proof demanded by that law must be offered. See circular of January 13, 1904 (32 L. D., 424, 440).

The motion is, accordingly, granted and the record remanded to the General Land Office for consideration and action in accordance herewith. The Department of Agriculture will be advised of all proceedings had before the Commissioner or the local officers and allowed to file such showing that it may see proper in the premises.

THE THREE-YEAR HOMESTEAD LAW.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, February 13, 1913.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: The following instructions under the "three-year homestead law" of June 6, 1912 (37 Stat., 123), will supersede those contained in Circular No. 142, dated July 15, 1912 (41 L. D., 103):

RESIDENCE.

(1) By the act of June 6, 1912 (37 Stat., 123), the period of residence necessary to be shown in order to entitle a person to patent under the homestead laws is reduced from five to three years, and the period within which a homestead entry may be completed is reduced from seven to five years. The three-year period of residence, however, is fixed not from the date of the entry but "from the time of establishing actual permanent residence upon the land." It follows, as a consequence, that credit can not be given for constructive residence for the period that may elapse between the date of the entry and that of establishing actual permanent residence upon the land.

(2) Honorably discharged soldiers and sailors of the War of the Rebellion and also of the Spanish War and the suppression of the insurrection in the Philippines, entitled to claim credit under their homestead entries for the period of their military service, may do so after they have "resided upon, improved, and cultivated the land

for a *period* of at least one year " after they shall have commenced their improvements. This is the requirement of section 2305 of the Revised Statutes, which is in nowise affected by the act of June 6, 1912. Respecting the cultivation to be required under said section it has been heretofore administered as requiring such showing as ordinarily applies in other cases preliminary to final proof, and as the new law exacts showing of cultivation of at least one-eighth of the area before final proof a showing should be exacted of a like amount for at least one year before final proof.

CULTIVATION.

(3) Prior to the passage of this act no specific amount of cultivation had been required respecting a homestead entry made under the general law; that is, an entry for 160 acres. With respect to every such entry section 2291 of the Revised Statutes had required proof of "cultivating *the same* for the term of *five years* immediately succeeding the time of filing affidavit." The words "the same" could refer only to the entry, and literally construed would require the cultivation of the entire tract entered for the term of five years. But a more liberal interpretation has properly obtained in the land department, and proof has been accepted upon a showing that the tract has been used in a husband-like manner, even though a smaller part of the entire entry had been actually cultivated than was in fact susceptible of cultivation. Furthermore, the long period of residence required (five years) has, in many instances, led to the acceptance of even a much smaller area of cultivation than husband-like methods and the character of the land would have reasonably justified. Under exceptional circumstances grazing land has been accepted as the equivalent of cultivation, where the lands were valuable only for grazing purposes. This can not be justified under any known definition of "cultivation," although some special legislation with reference to lands formerly within Indian reservations seems to require such a construction with respect to these particular lands. Under this special legislation lands formerly within certain Indian reservations have been first specifically classified as grazing lands, and then specifically opened to entry under the homestead law. It would be impossible to administer these special laws unless grazing is accepted as a compliance therewith, where it can be shown that the lands are in fact not capable of cultivation. The classification, however, was general, and where the general area was grazing in character it was so classified, even where it embraced local areas susceptible of cultivation. Where such lands are in fact physically and climatically susceptible of tillage, the cultivation provisions of the new homestead law must be applied. By that law it is required that the claimant "cultivate not less than one-sixteenth of the area

of his entry, beginning with the second year of the entry, and not less than one-eighth beginning with the third year of the entry, and until final proof, except that in the case of entries under section 6 of the enlarged-homestead laws, double the area of cultivation herein provided shall be required, but the Secretary may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation."

(4) The enlarged homestead acts here referred to (35 Stat., 639), (36 Stat., 531), authorize entries of 320 acres of lands designated for this purpose by the Secretary of the Interior, and require proof "that at least one-eighth of the area embraced in the entry was continuously cultivated to agricultural crops, other than native grasses, beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry." The residence provisions of the homestead law (and now of the new act) were applicable to these entries, with an exception relating to certain lands in the States of Utah and Idaho, with respect to which the requirement of residence is omitted, and in lieu thereof the entryman is required to cultivate twice the area required under the general provisions of the act. The enlarged homestead acts were intended to apply generally to lands suitable for cultivation only under dry-farming methods, and under these methods it is customary to summer fallow a portion of the land one year, planting it the following year. Under the new law such summer fallowing can not be accepted as the equivalent of cultivation, and this was equally true of the old laws, which required the land to be "cultivated to agricultural crops other than native grasses." The new law, however, does reduce the required area of cultivation to not less than one-sixteenth during the second year of the entry, and not less than one-eighth during the third year of the entry, and until final proof, except that in the case of entries under section 6 of the enlarged homestead laws, where residence is not required, one-eighth of the area of the entry must be cultivated during the second year, and one-quarter beginning with the third year of the entry, and until final proof. In other words, the effect of the new law, with respect to the enlarged homestead acts, except in instances where residence is not required, is generally to reduce by one-half the amount of cultivation to agricultural crops other than native grasses, which had previously been required.

CHARACTER OF CULTIVATION.

(5) In reducing the period of residence required in perfecting title to a tract of land entered under the homestead law from five to three years Congress has required that it be shown that an actual

cultivation has been accomplished of at least certain specified portions of the land entered. This amount has been fixed at one-sixteenth, beginning with the second year of the entry, and one-eighth the following year, and until proof is offered. In view of the liberal reduction in the period of residence making it possible to secure title in three years, which would require a showing of but two years' cultivation of one-sixteenth of the area entered, and an additional one-sixteenth for but one year, a mere breaking of the soil will not meet the terms of the statute, but such breaking or stirring of the soil must also be accompanied by planting or the sowing of seed and tillage for a crop other than native grasses.

(6) It should be noted that under the new law the period within which the cultivation should be made is reckoned *from the date of the entry*.

REDUCTION OF CULTIVATION.

(7) The Secretary of the Interior is authorized, upon a satisfactory showing therefor, to reduce the required area of cultivation. In the administration of this provision it is not believed that the physical or financial disabilities or misfortunes of the entryman should be the grounds of reduction, but the sole question should be as to whether, under the peculiar conditions governing the tract entered, the exaction of cultivation of this particular tract by any entryman to the amount required is reasonable. The actual special physical and climatic conditions of the land entered in each case must therefore determine whether the required amount of cultivation should be reduced. It is desirable that the entryman should, wherever practicable, know in advance what, if any, reduction can properly be made; and therefore, as a general regulation governing applications for reduction in area of cultivation, it is directed that all entrymen who desire a reduction shall file applications therefor during the first year of the entry and upon forms to be prepared and furnished by the Commissioner of the General Land Office and distributed through the land offices. Where a satisfactory showing is filed in support of an application for reduction, you will submit the same with your recommendation in the premises; otherwise the application will be by you rejected subject to the usual right of appeal. The final granting of any reduction in area of cultivation rests with the Secretary of the Interior, who may in appropriate cases defer action until final proof.

EXCEPTIONS.

(8) The requirements as to cultivation do not apply to entries made for lands within a reclamation project under the act of June 17, 1902 (32 Stat., 388), nor to entries made in State of Nebraska

under the act of April 28, 1904 (33 Stat., 547), commonly known as the Kinkaid Act. In such instances the existing requirements as to cultivation made by the acts named continue in force.

ENTRIES NOT REQUIRING RESIDENCE.

(9) In all entries made under section 6 of the enlarged homestead acts (35 Stat., 639, and 36 Stat., 531), under which residence is not required, the entryman must cultivate at least one-eighth of the land in the second year after date of the entry and one-fourth of it during each year thereafter until he makes proof, and the *existing period* of cultivation required under said acts is not reduced by the act of June 6, 1912.

PERMISSIBLE ABSENCES FROM THE HOMESTEAD.

(10) The law clearly requires that the homestead entryman shall establish an actual residence upon the land entered within six months after the date of entry. Where, owing to climatic reasons, sickness, or other unavoidable cause, residence can not be commenced within this period, the Commissioner of the General Land Office may, within his discretion, allow the settler such additional period, not exceeding in the aggregate 12 months, within which to establish his residence. It is not meant thereby that because, for the reasons stated, residence may not be commenced within the six-months' period, that the settler is authorized to delay the commencement of residence beyond the required period and after the cause no longer exists. It is not thought necessary to require an application in advance in order to entitle the settler to this additional privilege, but the full circumstances will be open to investigation and consideration upon contest.

(11) After the establishment of residence the entryman is permitted to be absent from the land for one continuous period of not more than five months in each year following, provided that upon absenting himself for such period he has filed in the local land office notice of the beginning of such intended absence. He must also file notice with the local land office upon his return to the land following such period of absence.

(12) In according such extended periods of absence the Congress has dealt liberally with the homestead entryman, and *bona fide* continuous residence during the remaining portions of the three-year period must be clearly shown.

(13) A second period of absence immediately following the first period, even though the two periods occur in different years, reckoned from the date of the establishment of actual residence, will not be recognized, as it was never contemplated that an absence was per-

missible in excess of six months in view of the specific provisions for contest provided for in section 2297 of the Revised Statutes. There should be at least some substantial period of actual continuous residence upon the land separating the periods of absence accorded under the statute. Only those protracted absences with respect to which notice has been given as required by the statute will be respected either in case of contest or on final proof. This law does not repeal or modify the acts of March 2, 1889 (25 Stat., 854), June 25, 1910 (36 Stat., 864), and April 30, 1912 (37 Stat., 105).

COMMUTATION.

(14) The privilege of commutation after 14 months' actual residence, as heretofore required by law, is unaffected by this legislation, excepting that the person commuting must be at the time a citizen of the United States. It has heretofore been the practice to permit the making of commutation proof upon a homestead entry by one who had merely declared his intention to become a citizen of the United States and prior to his actual naturalization. This practice, however, is abrogated, and in instances where commutation proof is made after the passage of this act it should be exacted and shown that the claimant, if foreign born, has become fully naturalized. Commutation proof can not, however, be made on entries under the enlarged homestead laws, the reclamation act, or on entries made under any other homestead law which prohibits commutation. As a rule of administration it will be required that upon submission of commutation proof in support of an entry made subject to the act of June 6, 1912, the cultivation of not less than one-sixteenth of the area embraced in the entry must be shown, that being the least amount of cultivation contemplated by Congress in connection with entries made under said act, unless the area capable of cultivation has been shown to be less than that amount and for that reason the specific requirement made by the statute has been reduced.

DEATH OF THE HOMESTEAD ENTRYMAN.

(15) Where the person making homestead entry dies before the offer of final proof, those succeeding to the entry in the order prescribed under the homestead law, in order to complete such entry must show that the entryman had complied with the law in all respects to the date of his death, and that they have since complied with the law in all respects as would have been required of the entryman had he lived, excepting that they are relieved from any requirement of residence upon the land. It follows, as a consequence, that

where the entryman had not complied with the law in all respects prior to his death the entry will be forfeited, and upon proof thereof such entry will be canceled. This will apply to all entries made under the new law.

EFFECT OF NEW LAW ON ENTRIES MADE PRIOR THERETO.

(16) An entryman, whose entry was made prior to June 6, 1912, may avail himself of the provisions of section 2291, as amended; however, if he desires to submit proof in accordance with the law under which his entry was made, he may do so, and need not have filed the election provided for in the last proviso to the amended section, the necessity for such election having been abrogated by a provision in the act making appropriations for sundry civil expenses of the Government approved August 24, 1912 (37 Stat., 455), but he must, in his published notice, state the law under which his proof is to be offered. Final proof under the new law must be made within five years from date of entry.

RULE PRESCRIBED RESPECTING CULTIVATION TO BE SHOWN ON ENTRIES MADE PRIOR TO, BUT ADJUDICATED UNDER, NEW LAW.

(17) It may be that such prior entryman can not show that he had cultivated one-sixteenth of the area embraced in his entry beginning with the second year of the entry and one-eighth beginning with the third year of the entry and until final proof, although he may have had during the year preceding his offer of proof one-eighth or more of the area embraced in his entry under actual cultivation, and may have cultivated one-sixteenth during the previous year, thus accomplishing the amount of cultivation required as a general rule under the new law, but not in the order and for the particular years required by that law.

(18) By the section I am authorized, under rules and regulations to be prescribed by me, to reduce the required area of cultivation. Acting thereunder, I have prescribed the following rule to govern action on proof submitted under the new law where the homestead entry was made prior to June 6, 1912:

Respecting cultivation necessary to be shown upon such an entry, in all cases where, upon considering the whole record, the good faith of the entryman appears, the proof will be acceptable if it shows cultivation of at least one-sixteenth for one year and of at least one-eighth for the next year and each succeeding year until final proof, without regard to the particular year of the homestead period in which the cultivation of the one-sixteenth was performed.

TIME FOR PROOF ON ENTRIES MADE BEFORE BUT ADJUDICATED UNDER
NEW LAW.

(19) The new law also requires that the proof shall be made within five years from date of entry and if the entry is to be administered under that law the department is not authorized to extend the period within which proof may be made, but when submitted after that time, in the absence of adverse claims, the entry may be submitted to the board of equitable adjudication for confirmation.

(20) Respecting entries heretofore or hereafter made requiring payment for the land entered in annual installments extending beyond the period of residence required under the new law, the homesteader may make his proof as in other cases, but final certificate will not be issued until the entire purchase price has been paid.

Very respectfully,

WALTER L. FISHER, *Secretary*.

[PUBLIC—No. 179; 37 STAT., 123.]

An Act To amend section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven of the Revised Statutes of the United States relating to homesteads.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven of the Revised Statutes of the United States be amended to read as follows:

“SEC. 2291. No certificate, however, shall be given or patent issued therefor until the expiration of three years from the date of such entry: and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry her heirs or devisee, in case of her death, proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time, citizens of the United States, shall be entitled to a patent, as in other cases provided by law: *Provided*, That upon filing in the local land office notice of the beginning of such absence, the entryman shall be entitled to a continuous leave of absence from the land for a period not exceeding five months in each year after establishing residence, and upon the termination of such absence the entryman shall file a notice of such termination in the local land office, but in case of commutation the fourteen months' actual residence as now required by law must be shown, and the person commuting must be at the time a citizen of the United States: *Provided*, That when the person making entry dies before the offer of final proof those succeeding to the entry must show that the entryman had complied with the law in all respects to the date of his death and that they have since complied with the law in all respects, as would have been required of the entryman had he lived, excepting that they are relieved from any requirement of residence upon

the land: *Provided further*, That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry, and until final proof, except that in the case of entries under section six of the enlarged-homestead law double the area of cultivation herein provided shall be required, but the Secretary of the Interior may, upon a satisfactory showing under rules and regulations prescribed by him, reduce the required area of cultivation: *Provided*, That the above provision as to cultivation shall not apply to entries under the act of April twenty-eighth, nineteen hundred and four, commonly known as the Kinkaid Act, or entries under the act of June seventeenth, nineteen hundred and two, commonly known as the reclamation act, and that the provisions of this section relative to the homestead period shall apply to all unperfected entries as well as entries hereafter made upon which residence is required: *Provided*, That the Secretary of the Interior shall, within sixty days after the passage of this act, send a copy of the same to each homestead entryman of record who may be affected thereby, by ordinary mail to his last known address, and any such entryman may, by giving notice within one hundred and twenty days after the passage of this act, by registered letter to the register and receiver of the local land office, elect to make proof upon his entry under the law under which the same was made without regard to the provisions of this act."

"SEC. 2297. If, at any time after the filing of the affidavit as required in section twenty-two hundred and ninety and before the expiration of the three years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government: *Provided*, That the three years' period of residence herein fixed shall date from the time of establishing actual permanent residence upon the land: *And provided further*, That where there may be climatic reasons, sickness, or other unavoidable cause, the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe."

Approved, June 6, 1912.

ERNEST P. SPAETH ET AL.¹

Decided November 23, 1912.

SOLDIERS' ADDITIONAL—APPROXIMATION.

The rule of approximation announced in George E. Lemmon, 36 L. D., 417, as applicable to locations of soldiers' additional rights, is recalled and vacated, and hereafter no approximation will be allowed in the location, by an assignee, of two or more such rights on one body of land.

ADAMS, *First Assistant Secretary*:

H. H. Grace, as intervener, has, through his attorney, appealed from decision of the Commissioner of the General Land Office of May

¹ See pages 489 and 490.

10, 1911, involving the application of Ernest P. Spaeth to enter, under sections 2306 and 2307, Revised Statutes, the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 6, T. 49 N., R. 71 W., Sundance, Wyoming, land district, based upon assignment of the alleged additional right of Franklin O. Knapp, by his administratrix, Emily Heller, for 15.50 acres, and assignment of the alleged additional right of William J. Hampton (6.06 acres), by his widow, Elizabeth Hampton.

The Commissioner recognized the said assignments as valid, but, inasmuch as the aggregate area of the rights presented amounts to only 21.56 acres, he held that additional right or rights must be tendered in order to bring the case within the rule of approximation as announced in the case of George E. Lemmon (36 L. D., 417; 37 L. D., 28).

The applicant has apparently acquiesced in the decision of the Commissioner, as he has not appealed therefrom. The intervener, Grace, has appealed only from that portion of the Commissioner's decision recognizing the assignment of the alleged additional right of William J. Hampton, by his widow. The ground of his objection is that the entire additional right of Hampton passed to Charles D. Gilmore by virtue of power of attorney executed by Hampton and his wife on June 5, 1875, granting to said Gilmore the right to locate the said soldiers' additional right on certain land described in said paper at the local land office at Shasta, California, and the release to him of all claim of the soldier to the proceeds of the sale. It is represented that N. P. Chipman succeeded to the rights of Gilmore in this and a number of like cases, and that Chipman has, through mesne conveyance, transferred the additional right of Hampton, to the extent of 6.06 acres, to Grace the intervener. The records show that William J. Hampton made homestead entry at Clarksville, Arkansas, December 16, 1869, for 73.94 acres, which was patented June 1, 1875. It also appears that entry was made in his name September 13, 1875, as additional to the aforesaid Arkansas entry, at Shasta, California, for 80 acres, as described in the aforesaid power of attorney. Said power of attorney executed by Hampton and his wife is in all essential respects like that involved in the case of H. B. Phillips (40 L. D., 448), and in the case of Edward H. Rife, assignee of William Temple *et al.*, decided October 12, 1912. As held in said decisions, the special assignment of the right effected by the power of attorney to locate and to sell was restricted to the land described in said power, and it cannot be held that any excess of the additional right over the area of that located under said power of attorney was transferred by the soldier by virtue of that instrument.

The assignment of the alleged additional right of Hampton, relied upon under the application of Spaeth, was executed by his widow,

Elizabeth Hampton, September 13, 1906, and subsequently transferred by mesne conveyance to the applicant.

In view of the above, it must be held that the claimed assignment of the alleged additional right of Hampton held by Grace is not evidenced by the instrument exhibited, which, of itself, furnishes no objection to the recognition of the claim presented by Spaeth. Therefore Spaeth's right will be respected unless Grace, within a limited time to be fixed by the Commissioner, makes showing of the institution of appropriate proceedings in furtherance of the establishment of his claimed right under assignment from the soldier.

Hereafter no approximation will be allowed in the matter of the location of soldiers' additional rights; first, because the law forbids it, in this, that it grants the right to enter further lands in amount that, with that originally entered, "shall not exceed one hundred and sixty acres," and, second, that as consolidation of such rights is respected, the reason for the rule of approximation, viz., necessity, is gone, because further rights can be secured and substituted in amount to equal that desired. The rule announced in the case of George E. Lemmon, *supra*, is hereby recalled and vacated.

Therefore, Spaeth will be required to furnish additional right or rights sufficient, with the valid rights already tendered, to equal the area of the land applied for.

The decision appealed from is modified accordingly.

ERNEST P. SPAETH ET AL. (ON REHEARING).

Decided March 8, 1913.

LAYLIN, *Assistant Secretary*:

The intervener, H. H. Grace, has filed a motion for rehearing of departmental decision, dated November 23, 1912 [41 L. D., 487], in the above entitled case, in which he was allowed a limited time, to be fixed by the Commissioner of the General Land Office, to show that he had instituted appropriate proceedings to establish his claimed right under assignment from William J. Hampton. In support of the motion he has filed an affidavit from N. P. Chipman, who is referred to in said departmental decision, which affidavit evidences Chipman's belief that Hampton sold his entire right to Gilmore, and that the unused 6.04 acres thereof has passed to the intervener.

In its said decision the Department also held that thereafter no approximation would be allowed in the matter of the location of soldiers' additional rights. John M. Rankin, Esq., of the Washington bar, has also filed a motion for rehearing in the case, upon the ground that this feature of the decision affects fractional recertified scrip owned by him.

After mature consideration of said motions and the arguments presented in support thereof, the Department finds no reason for changing the conclusion heretofore reached, and both motions are accordingly denied. It will be noted that in this case the claim is based upon assignment of two separate additional rights, that is, it is a consolidated entry, and under those conditions it is believed that no unreasonable hardship was imposed in requiring the locator to furnish additional right or rights sufficient in area, with that heretofore given, to equal the tract selected.

It is not intended hereby to hold that, in the location of a single additional right, where the area of the tract located is but a fraction greater than the right proffered, that the same may not be passed under the general rule respecting disposition of such tracts under other laws. Neither is it intended to recognize a practice wherein the additional right is sought to be used in a manner to acquire practically twice its area, as for instance, where location is made of a 40 acre tract upon a right calling for but 20 acres and a fraction of an acre.

SOLDIERS' ADDITIONAL LOCATIONS—APPROXIMATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 8, 1913.

REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: November 23, 1912, the Department, in the case of Ernest P. Spaeth, Sundance 05045, an application under sections 2306 and 2307, R. S., ruled as follows [41 L. D., 487]:

Hereafter no approximation will be allowed in the matter of the location of soldiers' additional rights: first, because the law forbids it, in this, that it grants the right to enter further lands in amount that, with that originally entered, "shall not exceed one hundred and sixty acres," and, second, that as consolidation of such rights is respected, the reason for the rule of approximation, viz., necessity, is gone, because further rights can be secured and substituted in amount to equal that desired. The rule announced in the case of George E. Lemmon (37 L. D., 28), is hereby recalled and vacated.

Under the above ruling you will require all applicants under said sections 2306 and 2307, R. S., to file rights for an area equal to the area of the land applied for.

Very respectfully,

FRED DENNETT,
Commissioner.

LEWIS C. LAYLEN,
Assistant Secretary.

DAYS ON WHICH OFFICES CAN BE CLOSED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 29, 1912.

United States Surveyors General, Registers and Receivers, and Chiefs of Field Divisions.

GENTLEMEN: It having come to the knowledge of this office that it is the practice of some subordinate officers of this bureau to suspend the public business and close their respective offices on days set apart as holidays by legislative or executive authority of the States in which the offices are located, your attention is called to circular of November 19, 1908, which directs the closing of all subordinate offices of this bureau on January 1, February 22, May 30, July 4, the first Monday in September, and December 25, which are declared public holidays by act of June 28, 1894 (28 Stat., 96). Also on such day as may be designated by proclamation of the President as "Thanksgiving Day." Your attention is also called to Executive order of May 22, 1909, on page 11 of circular of February 1, 1910, regulating leaves of absence, which directs that all offices of the Government, etc., shall, when January 1, February 22, May 30, July 4, and December 25 fall on Sunday, be closed to public business on the following Monday, excepting that when a State law fixes for a holiday another day than the Monday following such legal holiday, Government offices situated in such States shall be closed on the day which is in conformity to State law.

By letter of June 6, 1904, the Assistant Attorney-General of the Department of the Interior advised the Secretary of the Interior as follows:

I advise you that the law authorizes the closing of Federal offices located in the several States on all days declared holidays by the law of the State in which the office is located, and that employees in such offices should not be required to perform services on such days unless the state of the public business demands it.

While this opinion was approved by the Secretary, it was never promulgated as a regulation of the Department. On the contrary, the Secretary, by letter of May 19, 1905, informed this office that the matter of closing the subordinate offices of the General Land Office on such days as are set apart as holidays by legislative or executive authority of the State in which the offices are located is a matter for determination by the Commissioner of the General Land Office upon such report or information as may be furnished by the local officials.

You are therefore instructed to refrain hereafter from closing your offices on any days other than those specified in circular of November 19, 1908, unless otherwise directed.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved, December 7, 1912.

LEWIS C. LAYLIN,
Assistant Secretary.

REVISED REGULATIONS UNDER THE KINKAID ACTS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 18, 1912.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Section 7 of the act of Congress approved May 29, 1908, (35 Stat., 465), amended section 2 of the act of April 28, 1904 (33 Stat., 547), commonly known as the Kinkaid Act, to read as follows:

SEC. 2. That entrymen under the homestead laws of the United States within the territory above described who own and occupy the lands heretofore entered by them may, under the provisions of this act and subject to its conditions, enter other lands contiguous to their said homestead entry, which shall not, with the land so already entered, owned, and occupied, exceed in the aggregate six hundred and forty acres; and residence continued and improvements made upon the original homestead, subsequent to the making of the additional entry, shall be accepted as equivalent to actual residence and improvements made upon the additional land so entered, but final entry shall not be allowed of such additional land until five years after first entering the same, except in favor of entrymen entitled to credit for military service.

This amendment did not affect sections 1 and 3 of the Kinkaid Act, which read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after sixty days after the approval of this act entries made under the homestead laws in the State of Nebraska west and north of the following line, to wit: Beginning at a point on the boundary line between the States of South Dakota and Nebraska where the first guide meridian west of the sixth principal meridian strikes said boundary; thence running south along said guide meridian to its intersection with the fourth standard parallel north of the base line between the States of Nebraska and Kansas; thence west along said fourth standard parallel to its intersection with the second guide meridian west of the sixth principal meridian; thence south along said guide meridian to its intersection with the third standard parallel north of the said base line; thence west along said third standard parallel to its intersection with the range line between ranges twenty-five and twenty-six west of the sixth principal meridian; thence south

along said line to its intersection with the second standard parallel north of the said base line; thence west on said standard parallel to its intersection with the range line between ranges thirty and thirty-one west; thence south along said line to its intersection with the boundary line between the States of Nebraska and Kansas, shall not exceed in area six hundred and forty acres, and shall be as nearly compact in form as possible, and in no event over two miles in extreme length: *Provided*, That there shall be excluded from the provisions of this act such lands within the territory herein described as in the opinion of the Secretary of the Interior it may be reasonably practicable to irrigate under the national irrigation law, or by private enterprise; and that said Secretary shall, prior to the date above mentioned, designate and exclude from entry under this act the lands, particularly along the North Platte River, which in his opinion it may be possible to irrigate as aforesaid; and shall thereafter, from time to time, open to entry under this act any of the lands so excluded which, upon further investigation, he may conclude can not be practically irrigated in the manner aforesaid.

SEC. 3. That the fees and commissions on all entries under this act shall be uniformly the same as those charged under the present law for a maximum entry at the minimum price. That the commutation provisions of the homestead law shall not apply to entries under this act, and at the time of making final proof the entryman must prove affirmatively that he has placed upon the lands entered permanent improvements of the value of not less than \$1.25 per acre for each acre included in his entry: *Provided*, That a former homestead entry shall not be a bar to the entry under the provisions of this act of a tract which, together with the former entry, shall not exceed 640 acres: *Provided*, That any former homestead entryman who shall be entitled to an additional entry under section 2 of this act shall have for ninety days after the passage of this act the preferential right to make additional entry as provided in said section.

All general instructions heretofore issued under this act, and the instructions issued under the supplemental act of March 2, 1907 (34 Stat., 1224), (32 L. D., 670; 34 L. D., 87, and 546; 37 L. D., 225), are hereby modified and reissued as follows:

1. It is directed by the law that in that portion of the State of Nebraska lying west and north of the line described therein, which was marked in red ink upon maps transmitted with said circular, upon and after June 28, 1904, except for such lands as might be thereafter and prior to said date excluded under the proviso contained in the first section thereof, homestead entries may be made for and not to exceed 640 acres, the same to be in as nearly a compact form as possible, and must not in any event exceed 2 miles in extreme length.

2. Under the provisions of the second section, a person who within the described territory has made entry prior to May 29, 1908, under the homestead laws of the United States, and who now owns and occupies the lands theretofore entered by him, and is not otherwise disqualified, may make an additional entry of a quantity of land contiguous to his said homestead entry, which, added to the area of the original entry, shall make an aggregate area not to exceed 640 acres;

and he will not be required to reside upon the additional land so entered, but residence continued and improvements made upon the original homestead entry subsequent to the making of the additional entry will be accepted as equivalent to actual residence and improvements on the land covered by the additional entry. But residence either upon the original homestead or the additional land entered must be continued for the period of five years from the date of the additional entry, except that entrymen may claim and receive credit on that period for the length of their military service, not exceeding four years.

3. A person who has a homestead entry upon which final proof has not been submitted, and who makes additional entry under the provisions of section 2 of the act, will be required to submit his final proof on the original entry within the statutory period therefor, and final proof upon the additional entry must also be submitted within the statutory period from date of that entry.

4. Such additional entry must be for contiguous lands and the tracts embraced therein must be in as compact a form as possible, and the extreme length of the combined entries must not in any event exceed 2 miles.

5. In accepting entries under this act compliance with the requirement thereof as to compactness of form should be determined by the relative location of the vacant and unappropriated lands, rather than by the quality and desirability of the desired tracts.

6. By the first proviso of section 3 any person who made a homestead entry either within the territory above described or elsewhere prior to his application for entry under this act, if no other disqualification exists, will be allowed to make an additional entry for a quantity of land which, added to the area of the land embraced in the former entry, shall not exceed 640 acres, but residence upon and cultivation of the additional land will be required to be made and proved as in ordinary homestead entries. But the application of one who has an existing entry and seeks to make an additional entry under said proviso, can not be allowed unless he has either abandoned his former entry or has so perfected his right thereto as to be under no further obligation to reside thereon; and his qualifying status in these and other respects should be clearly set forth in his application.

7. Under said act no bar is interposed to the making of second homesteads for the full area of 640 acres by parties entitled thereto under existing laws, and applications therefor will be considered under the instructions of the respective laws under which they are made.

8. Upon final proof, which may be made after five years and within seven years from date of entry, the entryman must prove affirmatively that he has placed upon the lands entered permanent improvements

of the value of not less than \$1.25 per acre for each acre, and such proof must also show residence upon and cultivation of the land for the five-year period as in ordinary homestead entries, but credit for military service may be claimed and given under the supplemental act mentioned above. By the act of June 6, 1912 (37 Stat., 123), the period of residence necessary to be shown in order to entitle a person to patent under the homestead laws is reduced from five to three years, and the period within which a homestead entry may be completed is reduced from seven to five years. For information and instructions under that act reference is made to circular No. 142 of July 15, 1912.

9. In the making of final proofs the homestead-proof form will be used, modified when necessary in case of additional entries made under the provisions of section 2.

10. It is provided by section 3 that the fees and commissions on all entries under the act shall be uniformly the same as those charged under the present law for a maximum entry at the minimum price, viz: At the time the application is made \$14, and at the time of making final proof \$4, to be payable without regard to the area embraced in the entry.

11. In case that the combined area of the subdivision selected should, upon applying the rule of approximation thereto, be found to exceed in area the aggregate of 640 acres, the entryman will be required to pay the minimum price per acre for the excess in area.

12. Entries under this act are not subject to the commutation provisions of the homestead law.

13. In the second proviso of section 3 entrymen who had made their entries prior to April 28, 1904, were allowed a preferential right for 90 days thereafter to make the additional entry allowed by section 2 of the law.

14. The supplemental act approved March 2, 1907 (34 Stat., 1224), reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all qualified entrymen who, during the period beginning on the twenty-eighth day of April, nineteen hundred and four, and ending on the twenty-eighth day of June, nineteen hundred and four, made homestead entry in the State of Nebraska within the area affected by an act entitled "An act to amend the homestead laws as to certain unappropriated and unreserved public lands in Nebraska," approved April twenty-eighth, nineteen hundred and four, shall be entitled to all the benefits of said act as if their entries had been made prior or subsequent to the above-mentioned dates, subject to all existing rights.

SEC. 2. That the benefits of military service in the Army or Navy of the United States granted under the homestead laws shall apply to entries made under the aforesaid act approved April twenty-eighth, nineteen hundred and four, and all homestead entries hereafter made within the territory described in the aforesaid act shall be subject to all the provisions thereof.

Sec. 3. That within the territory described in said act approved April twenty-eighth, nineteen hundred and four, it shall be lawful for the Secretary of the Interior to order into market and sell under the provisions of the laws providing for the sale of isolated or disconnected tracts or parcels of land any isolated or disconnected tract not exceeding three quarter sections in area: *Provided*, That not more than three quarter sections shall be sold to any one person.

ISOLATED OR DISCONNECTED TRACTS.

GENERAL REGULATIONS.

15. The sale of isolated tracts within the area affected by the terms of this act is to be governed by the provisions of the acts of March 2, 1907, section 3 (34 Stat., 1224), and March 28, 1912 (37 Stat., 77), and all sales shall be made in the manner and form hereinafter provided.

16. Applications to have isolated tracts ordered into market must be filed with the register and receiver of the local land office in the district wherein the lands are situated. The applicant must deposit with the receiver, in the form of cash or postal money order, an amount equal to the value of the land based upon the minimum price fixed for public lands, which will be, ordinarily, \$1.25 per acre, or \$2.50 per acre if within railroad limits, or such price as may be fixed by special statute governing the disposition of the land applied for. The receiver will issue receipt therefor and deposit the money to his credit as "Unearned moneys." Should the applicant be the successful bidder at the sale, he will be given credit on the amount bid for the sum deposited with his application, and the receiver will apply the same as a part of the purchase money. If applicant is not the successful bidder, the receiver will return the sum deposited by his official check. Should the applicant withdraw his deposit, his action will be treated as a withdrawal of the application for sale and will be promptly so reported by the local officers. Money so deposited will not be returned by the receiver after receipt of the letter from this office ordering a tract into the market until the case is finally disposed of either by entry of the land, its sale to some one other than the applicant, or no sale.

17. Applicants must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal, or other minerals; the amount, kind, and value of timber or stone thereon, if any; whether the land is occupied, and if so the nature of the occupancy; for what purpose the land is chiefly valuable; why it is desired that same be sold; that applicant desires to purchase the land for his own individual use and actual occupation and not for speculative purposes, and that he has not heretofore purchased, under section 2455, Revised Statutes, or the amendments thereto, isolated tracts the area of which, when added to the area now applied for,

will exceed approximately 480 acres, and that he is a citizen of the United States. If applicant has heretofore purchased lands under the provisions of the acts relating to isolated tracts, same must be described in the application by subdivision, section, township, and range.

18. The affidavits of applicants to have isolated tracts ordered into market, and of their corroborating witnesses, may be executed before any officer having a seal and authorized to administer oaths in the county or land district in which the tracts described in the application are situated.

19. The officer before whom such affidavits are executed will cause each applicant and his witnesses to fully answer the questions contained upon the accompanying form and, after the answers to the questions therein contained have been reduced to writing, to sign and swear to same before him.

20. No sale will be authorized upon the application of a person who has purchased, under section 2455, Revised Statutes, or the amendments thereto, any lands the area of which, when added to the area applied for, shall exceed approximately 480 acres.

21. Only one tract may be included in an application for sale, and no tract exceeding approximately 480 acres in area will be ordered into the market.

22. No tract of land will be deemed isolated and ordered into the market unless, at the time application is filed, the said tract has been subject to homestead entry for at least two years after the surrounding lands have been entered, filed upon, or sold by the Government, except in cases where some extraordinary reason is advanced sufficient, in the opinion of the Commissioner of the General Land Office, to warrant waiving this restriction.

23. The local officers will on receipt of applications note same upon the tract books of their office, and if the applications are not properly executed, or not corroborated, they will reject the same, subject to the right of appeal. Applications found to be properly executed and corroborated will be disposed of as follows:

(1) If all, or any portion, of the land applied for is not subject to disposition under the provisions of paragraph 22, or by reason of some prior appropriation of the land, the application will be forwarded to the General Land Office with the monthly returns, accompanied by a report as to the status of the land applied for and the surrounding lands, and any other objection to the offering known to the local officers. Upon determining what portion, if any, of the lands applied for should be ordered into the market, the Commissioner of the General Land Office will call upon the local officers and the Chief of Field Division for the report, as next provided for, concerning the value of the land.

(2) If all the land applied for is vacant, and not withdrawn or otherwise reserved from such disposition, and the status of the surrounding lands is such that a sale might properly be ordered under paragraph 22, the local officers, after noting the application on their records, will promptly forward the same to the Chief of Field Division for report as to the value of the land and any objection he may wish to interpose to the sale, and the register will make proper notations on his schedule of serial numbers in the event the application is not returned in time to be forwarded with the returns for the month in which it is filed. Upon receipt of the application from the Chief of Field Division, with his report thereon, the local officers will attach their report as to the status of the land and that surrounding, the value of the land applied for if they have any knowledge concerning the same, and any objection to the sale known to them, and forward the papers to the General Land Office with the returns for the current month.

24. An application for sale under these instructions will not segregate the land from entry or other disposal, for such lands may be entered at any time prior to the day of sale. Should all of the land applied for be entered or filed upon while the application for sale is in the hands of the Chief of Field Division, the local officers will so advise him and request the return of the application for forwarding to the General Land Office. Likewise should any or all of the land be entered or filed upon while the application for sale is pending before the General Land Office, the local officers will so report by special letter.

25. Upon receipt of letter authorizing the sale, the local officers will at once examine the records to see whether the tract, or any part thereof, has been entered. If the examination of the record shows that all of the tract has been entered or filed upon, the local officers will not promulgate the letter authorizing the sale, but will report the facts to the General Land Office, whereupon the letter authorizing the sale will be revoked. If a part of the land has been entered, they will so report and proceed as provided below as to the remainder. If thereafter, and at any time prior to the date set for sale, a portion of the land applied for is entered or filed upon, that portion will be eliminated from the sale; and if all the land is entered or filed upon no sale will be held. In either event the applicant should be promptly advised by ordinary mail and report made to this office on or after date of sale. In all cases where no sale is had the land will, in the absence of other objection, become subject to entry or filing at once without action by this office.

The local officers will prepare a notice for publication on the form hereinafter given, describing the land found to be unentered and

fixing a date for the sale, which date must be far enough in advance to afford ample time for publication of the notice and for the affidavit of the publisher to be filed in the local land office prior to the date of the sale. The register will also designate a newspaper as published nearest to the land described in the notice. The notice will be sent to the applicant with instructions that he must publish the same at his expense in the newspaper designated by the register. Payment for publication must be made by applicant directly to the publisher, and in case the money for publication is transmitted to the receiver he must issue receipt therefor and immediately return the money to the applicant by his official check, with instruction to arrange for the publication of the notice as hereinbefore provided.

If, on the day set for the sale, the affidavit of the publisher, showing proper publication, has not been filed in the local land office, the register and receiver will report that fact to this office and will not proceed with the sale.

26. Notice must be published once a week for 5 consecutive weeks (or 30 consecutive days, if in a daily paper) immediately prior to date of sale, but a sufficient time should elapse between the date of last publication and date of sale to enable the affidavit of the publisher to be filed in the local land office. The notice must be published in the paper designated by the register as nearest the land described in the application. The register and receiver will cause a similar notice to be posted in the local land office, such notice to remain posted during the entire period of publication. The publisher of the newspaper must file in the local land office, prior to the date fixed for sale, evidence that publication has been had for the required period, which evidence may consist of the affidavit of the publisher, accompanied by copy of the notice published.

27. At the time and place fixed for the sale the register or receiver will read the notice of sale, and allow all qualified persons an opportunity to bid. Bids may be made through an agent personally present at the sale as well as by the bidder in person. The register or receiver conducting the sale will keep a record showing the names of the bidders and the amount bid by each. Such record will be transmitted to this office with the other papers in the case.

The sale will be kept open for one hour after the time mentioned in the published notice. At the expiration of the hour, and after all bids have been offered, the local officers will declare the sale closed and announce the name of the highest bidder, who will be declared the purchaser, and he must immediately deposit the amount bid by him with the receiver (allowing credit for the original deposit, if applicant is the successful bidder), and within ten days thereafter furnish evidence of citizenship, nonmineral and nonsaline affidavit,

Form 4-062, or nonsaline affidavit, Form 4-062A, as the case may require. Upon receipt of the proof, and payment having been made for the lands, the local officers will issue the proper final papers.

28. No lands will be sold at less than the price fixed by law, nor at less than \$1.25 per acre. Should any of the lands offered be not sold, the same will not be regarded as subject to private cash entry (act of Mar. 2, 1889, 25 Stat., 854), but may again be offered for sale in the manner herein provided.

29. After each offering where the lands offered are not sold, the local officers will report by letter to the General Land Office. No report by letter will be made when the offering results in a sale, but the local officers will issue cash papers as in ordinary cash entries, noting thereon the date of the letter authorizing the offering, and report the same in their current monthly returns. With the papers must also be forwarded the affidavit of publisher showing due publication, and the register's certificate of posting.

ACT OF MARCH 28, 1912.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-four hundred and fifty-five of the Revised Statutes of the United States be amended to read as follows:

"SEC. 2455. It shall be lawful for the Commissioner of the General Land Office to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than one dollar and twenty-five cents an acre, any isolated or disconnected tract or parcel of the public domain not exceeding one-quarter section which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land officers of the district in which such land may be situated: *Provided*, That any legal subdivisions of the public land, not exceeding one-quarter section, the greater part of which is mountainous or too rough for cultivation, may, in the discretion of said Commissioner, be ordered into the market and sold pursuant to this act upon the application of any person who owns lands or holds a valid entry of lands adjoining such tract, regardless of the fact that such tract may not be isolated or disconnected within the meaning of this act: *Provided further*, That this act shall not defeat any vested right which has already attached under any pending entry or location."

Approved, March 28, 1912.

REGULATIONS UNDER FIRST PROVISIO OF ACT OF MARCH 28, 1912.

The first proviso to the act of March 28, 1912, authorizes the sale of legal subdivisions not exceeding one-quarter section, the greater part of which is mountainous and too rough for cultivation, upon the application of any person who owns or holds a valid entry of lands adjoining such tract, and regardless of the fact that such tract may not be actually isolated by the entry or other disposition of surround-

ing lands. It is left entirely to the discretion of the Land Department to determine whether a tract shall be sold, and it will not be practicable to prescribe a set of rules governing the conditions which would render a tract susceptible to sale under the proviso. Applications will be disposed of by you in accordance with the "General Regulations," except paragraph 22, which is not applicable, and no tract exceeding 160 acres in area will be ordered into the market under the proviso. Applications may be made upon the form provided (4-008C) and printed herein, properly modified as necessitated by the terms of the proviso. In addition the applicant, or applicants, must furnish proof of his or their ownership of the whole title in adjoining land, or that he holds a valid entry embracing adjoining land, in connection with which entry he has fully met the requirements of law; also detailed evidence as to the character of the land applied for, the extent to which it is cultivable, and the conditions which render the greater portion unfit for cultivation; also a description of any and all lands theretofore applied for under the proviso or purchased under section 2455 or the amendments thereto. This evidence must consist of an affidavit by the claimant, corroborated by the affidavits of not less than two disinterested persons having actual knowledge of the facts.

No sale will be authorized under the proviso upon the application of a person who has procured one offering thereunder except upon a showing of strong necessity therefor owing to some peculiar condition which prevented original application for the full area allowed to be sold at one time, 160 acres. And in no event will an application be entertained where the applicant has purchased under section 2455, or the amendments thereto, an area which, when added to the area applied for, shall exceed approximately 160 acres.

In the notices for publication and posting, where sale is authorized under the proviso, you will add after the description of the land, "This tract is ordered into the market on a showing that the greater portion thereof is mountainous and too rough for cultivation."

ISOLATED TRACTS OF COAL LAND.

The act of Congress approved April 30, 1912 (37 Stat., 105), provides:

That unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to disposition under the laws providing for the sale of isolated or disconnected tracts of public lands, but there shall be a reservation to the United States of the coal in such lands so sold, and of the right to prospect for, mine, and remove the same in accordance with the provisions of the act of June twenty-second, nineteen hundred and ten, and such lands shall be subject to all the conditions and limitations of said act.

In administering this act the foregoing regulations should be followed, in so far as they are applicable, and these additional instructions are prescribed:

(1) An application to have coal land offered at public sale must bear across its face the notation provided by paragraph 7 (a) of the circular of September 8, 1910, 39 L. D., 179; in the printed and posted notice of sale will appear the statement:

This land will be sold in accordance with, and subject to, the provisions and reservations of the act of June 22, 1910 (36 Stat., 583).

The purchaser's consent to the reservation of the coal in the land to the United States will not be required, but the cash certificate and patent will contain, respectively, the provisions specified in paragraph 7 (b) of said circular of September 8, 1910.

(2) In cases where offerings have been had, and sales made, of lands coming within the purview of the act of April 30, 1912, the purchasers may furnish their consent to receive patents, containing the limitation provided by said paragraph 7 (b), and, thereupon, the entries may be confirmed and patents, limited as indicated, may issue.

These regulations constitute a revision of circular No. 72, of January 19, 1912 [40 L. D., 369], and its consolidation with circulars No. 103, of April 30, 1912 [40 L. D., 584], and No. 117, of May 23, 1912 [40 L. D., 30], and supersede those circulars.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

SAMUEL ADAMS,

First Assistant Secretary.

[Form 4-008C.]

APPLICATION FOR SALE OF ISOLATED OR DISCONNECTED TRACTS.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,

-----,
-----, 19--.

To the Commissioner of the General Land Office:

----- of -----
-----, requests that the -----
of section -----, township -----, range -----, be ordered into market and
sold under the act of March 2, 1907 (34 Stat., 1224), and March 28, 1912 (37
Stat., 77), at public auction, the same having been subject to homestead entry
for at least two years after the surrounding lands were entered, filed upon, or
sold by the Government. Applicant states that he is a -----
(Insert statement that affiant is a native-born or naturalized citizen, as the case may be.)
citizen of the United States; that this land contains no salines, coal, or other
mineral, and no stone except -----

-----; that there is no
(State amount and character.)

timber thereon except_____trees of the_____species, ranging from_____inches to_____feet in diameter, and aggregating about_____feet stumpage measure, of the estimated value of \$_____; that the land is not occupied except by_____of_____post office, who occupies and uses it for the purpose of_____but does not claim the right of occupancy under any of the public land laws; that the land is chiefly valuable for_____and that applicant desires to purchase same for his own individual use and actual occupation for the purpose of_____and not for speculative purposes; that he has not heretofore purchased public lands sold as isolated tracts, the area of which when added to the area herein applied for will exceed approximately 480 acres. The lands heretofore purchased by him under said act are described as follows: _____

If this request is granted, applicant agrees to have notice published at his expense in the newspaper designated by the register.

(Applicant will answer fully the following questions:)

Question 1. Are you the owner of land adjoining the tract above described? If so, describe the land by section, township, and range.

Answer_____

Question 2. To what use do you intend to put the isolated tract above described, should you purchase same?

Answer_____

Question 3. If you are not the owner of adjoining land, do you intend to reside upon or cultivate the isolated tract?

Answer_____

Question 4. Have you been requested by anyone to apply for the ordering of the tract into market? If so, by whom?

Answer_____

Question 5. Are you acting as agent for any person or persons or directly or indirectly for or in behalf of any person other than yourself in making said application?

Answer_____

Question 6. Do you intend to appear at the sale of said tract, if ordered, and bid for same?

Answer_____

Question 7. Have you any agreement or understanding, expressed or implied, with any other person or persons that you are to bid upon or purchase the lands for them or in their behalf, or have you agreed to absent yourself from the sale or refrain from bidding so that they may acquire title to the land?

Answer_____

(Sign here with full Christian name.)

We are personally acquainted with the above-named applicant and the land described by him, and the statements hereinbefore made are true to the best of our knowledge and belief.

(Sign here with full Christian name.)

(Sign here with full Christian name.)

I certify that the foregoing application and corroborative statement were read to or by the above-named applicant and witnesses, in my presence, before affiants affixed their signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by _____; that I verily believe affiants to be credible persons, and the _____) (P. O. address.) identical persons hereinbefore described; that said affidavits were duly subscribed and sworn to before me, at my office, at _____, this _____ day of _____, 19__.

 (Official designation of officer.)

[Form 4—093.]

ISOLATED OR DISCONNECTED TRACTS.

DEPARTMENT OF THE INTERIOR. UNITED STATES LAND OFFICE.

_____, 19__.
 I, _____, (_____) (Male or female.)

being first duly sworn, upon oath state that my post-office address is _____; that I am the purchaser of _____, section _____, township _____, range _____, meridian, containing _____ acres, in Nebraska, under the acts of March 2, 1907 (34 Stat., 1224), and March 28, 1912 (37 Stat., 77); that I _____ (Insert statement that affiant is a native-born or naturalized citizen, as the case may be.) Record evidence of naturalization must be furnished.) of the United States; that said purchase is made for my own use and benefit, and not, directly or indirectly, for the use and benefit of any other person; that I have not heretofore purchased under the provisions of said acts, either directly or indirectly, any lands, except _____ (Give description of lands heretofore purchased under this act, if any.)

 (Sign here with full Christian name.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 125, U. S. Criminal Code, below.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by _____). (Give full name and post-office address.)

and that said affidavit was duly subscribed and sworn to before me, at my office, in _____ (Town, county, and State.) within the _____ land district, this _____ day of _____, 19__.

 (Official designation of officer.)

SEC. 125. U. S. Criminal Code. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

[Forms 4-348g and 4-348h.]

NOTICE OF PUBLICATION—ISOLATED TRACT.

PUBLIC LAND SALE.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,

----- 19--.

Notice is hereby given that, as directed by the Commissioner of the General Land Office, under the provisions of the acts of Congress approved March 2, 1907 (34 Stat., 1224), and March 28, 1912 (37 Stat., 77), pursuant to the application of -----, Serial No. -----, we will offer at public sale to the highest bidder, but at not less than \$----- per acre, at ----- o'clock ----- m., on the ----- day of ----- next, at this office, the following tract of land: -----

Any persons claiming adversely the above-described land are advised to file their claims or objections on or before the time designated for sale.

Register.

Receiver.

CHARLES O. ASP.

Decided December 21, 1912.

HOMESTEAD—COMMUTATION—RESIDENCE.

Commutation proof upon homestead entries, showing less than fourteen months residence, should not be received, except in cases where statutory authority exists to the contrary.

DEPARTMENTAL DECISIONS OVERRULED.

Halvor K. Halvorson, 39 L. D., 456, and Telluf B. Nesland, unreported, overruled.

ADAMS, *First Assistant Secretary:*

Charles O. Asp made homestead entry August 24, 1908, for the SE. $\frac{1}{4}$, Sec. 33, T. 153 N., R. 41 W., 5th P. M., Crookston, Minnesota, land district, being a part of the ceded Red Lake Indian Reservation, and sold "subject to the homestead laws of the United States," as

provided by the act of February 20, 1904 (33 Stat., 46). He submitted commutation proof, April 6, 1910, making the payments required by the statute, and final certificate issued on the same date.

The General Land Office, November 19, 1910, rejected the commutation proof and held the final certificate for cancellation, for the reason that said proof does not meet the requirements of law as to residence and cultivation. From this decision the entryman has appealed to the Department.

There seems no doubt that the General Land Office is right in its conclusions. The appellant, however, relies upon the unreported case of Nesland, decided September 17, 1907, and mentioned in the case of Halvorson, 39 L. D., 456. The case in hand does not come within the decision of either of these cases, inasmuch as it is clear that residence was not in fact established within six months of the entry. It is proper to add, however, that the Department does not now feel that either of these cases was correctly decided, and they are, therefore, hereby overruled.

The Commissioner of the General Land Office will call the attention of all registers and receivers to the above ruling and will direct them hereafter to receive no final commutation proofs showing less than 14 months residence, except in cases where statutory authority exists to the contrary. Cases where proof has already been made, or shall be made before January 1, 1913, by entrymen in reliance upon the Nesland and Halvorson cases, and where from the facts it appears that hardship would be inflicted upon the entryman by following the above directions, may be reported by the Commissioner to the Department for specific instructions.

FRANK WELLER.

Decided December 21, 1912.

SOLDIERS' ADDITIONAL—RETURN OF PAPERS.

The land department will not return papers filed in support of a claim of soldiers' additional right under section 2306, Revised Statutes, where the claim is found to be invalid.

SOLDIERS' ADDITIONAL—BASIS OF CLAIM.

One who prior to the date of the adoption of the Revised Statutes had made homestead entry for less than 160 acres, which was canceled for abandonment, and subsequently, also prior to that date, upon his statement under oath that he had not theretofore perfected or abandoned a homestead entry, was permitted to make another entry, for 160 acres, which was later also canceled for abandonment, will not be heard to claim that the later entry so made by him, which on its face was regular and legal, was a nullity, in order to bring himself within the terms of section 2306, Revised Statutes, as one who prior to the adoption of the Revised Statutes had "entered under the homestead laws a quantity of land less than 160 acres."

DEPARTMENTAL DECISIONS DISTINGUISHED.

Royal B. Shute, 31 L. D., 26, and Price Fruit, 36 L. D., 486, distinguished.

ADAMS, First Assistant Secretary:

Frank Weller has appealed from decision of March 9, 1912, by the Commissioner of the General Land Office, denying his request for return of the assignment papers filed by him as assignee of Moses M. Dudley, in connection with application to enter under Sec. 2306, Revised Statutes, the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 21, T. 115 N., R. 81 W., at the Pierre, South Dakota, land district.

The application to enter was rejected by the Commissioner on March 2, 1911, for the assigned reason that the claimed additional right was invalid. Appeal from that action to the Department was taken, but prior to action thereon said appeal was withdrawn and the case was returned to the Commissioner without action. The Commissioner denied the present application for the return of the papers, for the reason that the alleged right had been found invalid, and that to return same would probably afford opportunity for a new application to enter, based upon the same invalid right, thus necessitating readjudication, and also possibly depriving the office of the use of papers which might be needed in connection with criminal proceedings.

It is a well established rule of the Department to refuse return of papers on file in support of a claim of soldiers' additional right to enter under Sec. 2306, Revised Statutes, where it is found that the claim is invalid. In such case the purported assignment has no value, and could serve no purpose except to be made an instrument of fraud, and therefore the Government, knowing the claim to be spurious, will not release it to again become the subject of barter and sale, with the probability of innocent persons being deceived thereby, and resulting in further useless harassment to the Government.

The contention is made in support of the appeal that the additional right claimed in this case is a valid subsisting right. The facts in this case are as follows: Moses M. Dudley, who claims to have served in the Army of the United States, for more than ninety days, during the Civil War, made homestead entry, February 6, 1868, at Boonville, Missouri, for 120 acres, which was canceled for abandonment April 26, 1871. He also made homestead entry, November 8, 1872, for the SE. $\frac{1}{4}$, Sec. 24, T. 19 N., R. 3 W., Salina, Kansas, containing 160 acres, stating under oath in his said entry papers that he had not theretofore perfected or abandoned an entry under the homestead act. Said latter entry was canceled January 19, 1874, on contest initiated May 22, 1873, on the charge of abandonment.

The Commissioner held that said second entry of Dudley was undoubtedly fraudulent, because at the time of making same there was no law allowing second entries, and it must be held, notwithstanding the fraudulent character of the entry, that such entry

exhausted the said entryman's additional homestead right, "because to hold otherwise would allow him to take advantage of his own wrong."

Section 2306, Revised Statutes, under which claim for additional right of entry is made, reads as follows:

Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

It is clear that Dudley's claim does not come within the provisions of said section, for he has not the status of a person who prior to June 22, 1874, the date of the approval of the Revised Statutes, made homestead entry for less than 160 acres. His homestead entries aggregated 280 acres. He cannot now be heard to say that his second entry for 160 acres was a nullity. Upon its face it was a legal entry, and it stood upon the records as a legal entry until canceled on contest for abandonment. It was made as an original entry, not as an additional or second entry. It was allowed upon misrepresentation. If the true facts had been known, the entry could not have been legally allowed, but the entry was properly allowed upon the showing there made, and it is the making of an entry, free from error on the part of the land officials, not the earning of patent thereunder, which exhausts the right.

This case is clearly distinguishable from the case of Royal B. Shute (31 L. D., 26), cited by claimant, for in that case the second entry was clearly illegal and erroneously allowed upon the facts shown. The case of Price Fruit (36 L. D., 486), is also cited in support of the claim. That case may also be distinguished from this, as that case involved a second entry made after the date of approval of the Revised Statutes, while this case involves an entry made before that date. In that case the question was whether the soldier had exhausted his additional right; this case involves the question whether the soldier ever had an additional right under section 2306, Revised Statutes. Furthermore, the Department is not disposed to follow the reasoning employed in that case, to the effect that the said second or additional entry was a nullity. Under the facts appearing in this case the Department is of the opinion that this soldier is not entitled to an additional right under Sec. 2306, Revised Statutes. Therefore, under the established practice of the Department, the papers will not be returned.

The decision appealed from is affirmed.

VIVIAN ANDERSON PACE FEEMSTER.

Decided December 21, 1912.

HOMESTEAD—MARRIED WOMAN—MINOR—DESERTED WIFE.

Where a married woman, a minor, is deserted by her husband, she does not thereby, so long as the disqualification of minority exists, become qualified, as a deserted wife, to make homestead entry, unless she be the head of a family.

ADAMS, *First Assistant Secretary:*

Vivian Anderson Pace Feemster has appealed from the decision of the Commissioner of the General Land Office dated September 22, 1911, reversing the action of the local officers and holding for cancellation her homestead entry made on May 2, 1907, for the NE. $\frac{1}{4}$, Sec. 22, T. 18 N., R. 38 E., N. M. P. M., Clayton, New Mexico, land district, upon which commutation proof was submitted on October 22, 1909.

The decision of the Commissioner was based substantially upon the finding that the claimant had not maintained residence upon the land. The Department will not consider the conflicting and inconclusive testimony upon that question, since it clearly appears that the entry was made without authority of law and must be canceled for that reason.

The claimant was 14 years of age at the date of the entry and was, at that time, the deserted wife of one Pace, from whom she was soon after divorced. She was married to her present husband, Feemster, on August 24, 1910.

It will be thus seen that the claimant was at the date of her entry, and is now, a minor. She was not, therefore, qualified under section 2289, Revised Statutes, to make the entry under consideration, unless she was at that time the head of a family. The marriage of a woman under 21 years of age adds the disqualification of coverture to that of minority, and in the event that she is deserted by her husband, such desertion, while it removes the disqualification growing out of the presumption that the husband is the head of the family, does not affect her status as a minor. Were there evidence that the claimant, when abandoned, was left with children, or others of her household, dependent upon her for support, such fact would have constituted her the head of the family and qualified her to make this entry. It is sufficiently shown, however, that for some months after making said entry, her father and mother lived upon the land with her. The father appears to have been a man qualified, physically and otherwise, to support his family. The claimant had no children. It is obvious that the father was then in fact the head of the family and that she was a member thereof. When he moved to another place and she was left alone upon the land, she did not thereby become the

head of a family. An individual is never a family, that term being applicable only to the collective body of persons living as a household.

No reported case imports qualification to make homestead entry to one shown to be a minor, merely because of the marriage and desertion of such person. The reported cases go no further than to hold that the disqualification due to coverture is removed by *bona fide* separation or living apart, and that where, under such circumstances, the wife has arrived at the age of twenty-one years or is left as the actual head of the family, she may make a homestead entry, if otherwise qualified. But a separation, in whatever form or through whatsoever means accomplished, does not, of itself, release her, on applying to make homestead entry, from showing due qualification, as would have been required had she never been married.

As above modified, the decision of the Commissioner is affirmed and the entry canceled.

GARVEY v. TUISKA.

Decided December 23, 1912.

TIMBER AND STONE APPLICATION—HOMESTEAD APPLICATION.

Paragraph 30 of the regulations of November 30, 1908, provides that after the filing of a timber and stone application no other application under any public land law shall be received for the land until the timber and stone application has been finally disposed of adversely to the applicant; and no rights are acquired under a homestead application received and filed contrary to such regulation.

HOMESTEAD APPLICATION—DEATH OF APPLICANT.

No such right is acquired by a mere application to make homestead entry as will, in event of the death of applicant, descend to his widow or heirs, or that can be disposed of by will; nor is there any authority of law for the allowance of entry, in such case, in the name of the deceased applicant.

ADAMS, *First Assistant Secretary*:

On April 10, 1911, William H. Garvey filed his timber and stone sworn statement for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 20, T. 54 N., R. 19 W., 4th P. M., Duluth, Minnesota, land district.

On July 15, 1911, during the pendency of said sworn statement, Jacob Tuiska filed homestead application for said land, together with an affidavit, alleging that the tract was agricultural in character, not valuable for timber, and that he desired to make entry thereof for the purpose of residence and cultivation, and that he therefore protested against the allowance of Garvey's filing and asked that a hearing be ordered.

On August 14, 1911, Garvey filed a relinquishment of all right, title, and claim to the land, under his sworn statement, together with an application to make homestead entry therefor.

Upon the filing of the relinquishment, the local officers allowed Tuiska's application and rejected the homestead application filed by Garvey.

Upon appeal by Garvey, the Commissioner of the General Land Office, on January 29, 1912, held Tuiska's entry for cancellation unless, within thirty days from notice, he showed cause why his entry should not be canceled and the homestead application of Garvey allowed. From this decision, Lisa Tuiska, widow of Jacob Tuiska, deceased, has appealed.

The action of the Commissioner was proper, not only because, under paragraph 30 of the regulations of November 30, 1908 (37 L. D., 289, 296), Tuiska acquired no right by the filing of his homestead application, but for the reason that it is suggested by certain papers on file with the record that Tuiska died several days before the date of the allowance of his homestead application. There is no authority of law for the allowance of a homestead entry in the name of a dead man, nor did Tuiska acquire any right by the filing of his application that could descend to his widow or heirs, or be disposed of by will. The filing of the application created no interest or estate in the land and did not segregate it from the public domain, and Tuiska's death, if he died as suggested, terminated his claim as effectually as if he had withdrawn the application in his lifetime. Congress has made no provision for succession and descent with reference to a mere application to enter, and this Department has no authority in disposing of the public domain to give validity to claims of succession or descent of inchoate rights where Congress has failed to provide therefor.

As herein modified, the decision of the Commissioner is affirmed and the rule to show cause will issue as directed by him, against Lisa Tuiska, the widow of Jacob Tuiska, deceased.

KELLER v. ATKINS.

Decided January 2, 1913.

PRACTICE—CONTEST—SERVICE OF NOTICE.

Where notice of contest was served within the time fixed by Rule 8 of Practice, the contest does not abate, under that rule, merely because contestant failed to serve with the notice a copy of the affidavit of contest, as required by Rule 7—Rule 12 specifically declaring that no contest proceeding shall abate because of any defect in the manner of service of notice in any case where copy of the notice or affidavit of contest is shown to have been received by the person to be served.

ADAMS, First Assistant Secretary:

October 15, 1909, William A. Atkins made homestead entry No. 03645, for the NE. $\frac{1}{4}$, Sec. 18, T. 23 S., R. 9 W., Las Cruces, New

Mexico, land district. August 14, 1911, Irvin B. Keller filed contest affidavit, charging that Atkins had not resided upon the land or improved the same. Notice issued August 14, 1911, and August 17, 1911, proof was filed, showing personal service of a copy of the notice on Atkins. September 15, 1911, motion, supported by Atkins's affidavit, was filed, asking for dismissal of the contest upon the ground that a copy of the contest affidavit had not been served upon him. On said date the local officers rendered their joint decision, sustaining motion and dismissing contest. September 18th, Atkins filed a relinquishment of his homestead entry, and was thereupon allowed to make desert land entry for the same land. From the decision of the Commissioner of the General Land Office, dated December 20, 1911, directing Atkins to show cause why his entry should not be canceled for conflict with the prior preference right of Keller to make entry for the land, this appeal is prosecuted to the Department.

It is contended on appeal that under Rule 8 of the new Rules of Practice, the contest abated upon contestant's failing to serve a copy of the affidavit of contest with the notice. Rule 7, provides that—

Except when service is made by publication, copy of the affidavit of contest must be served with such notice.

Rule 8 provides:

Unless notice of contest is personally served within 30 days after issuance of such notice and proof thereof made not later than 30 days after such service, or if service by publication is ordered, unless publication is commenced within 10 days after such order and proof of publication is made not later than 20 days after the fourth publication, as specified in rule 10, the contest shall abate.

It is earnestly insisted that the notice served was defective, and, under the above rule, the contest abated. It will be observed, however, that the rule above quoted prescribes the number of days within which service of contest notice must be made, and also the period within which proof of the service of such notice must be made, both in the case of personal service, and service by publication, and it provides that unless notice be served and proof thereof furnished within the time therein specified, the contest shall abate.

As it is admitted that "notice of contest" was served, Rule 8 can have no application. The present case is therefore governed by Rule 12, which is not in any way in conflict with Rule 8, covering only cases where it is claimed that service as made is defective, and which provides as follows:

No contest proceeding shall abate because of any defect in the manner of service of notice in any case where copy of the notice or affidavit of contest is shown to have been received by the person to be served; but, in such case, the time to answer may be extended in the discretion of the register and receiver.

As the above rule provides that where notice *or* affidavit of contest shall have been received the contest shall not abate, the defend-

ant's motion should have been overruled. The only remedy of the contestee in such case is the additional time within which to make answer which he may be accorded by the local officers, in their discretion.

It follows, therefore, inasmuch as the plaintiff's contest was improperly dismissed and he took an appeal therefrom, that his rights were not prejudiced by the erroneous action of the local officers, and he should not be deprived of the fruits of his contest, provided he had a good cause of action.

As above stated, the claimant relinquished his entry while it was under contest, and made entry. Ordinarily, the relinquishment would be held as induced by the contest, but as the local officers held that the contest had abated, it may be that their action induced the claimant to relinquish. Claimant will, therefore, be given thirty days after service of new notice to make answer to the charges against his homestead entry, which contest is hereby reinstated, and thereafter the case will be proceeded with under the rules governing contests, and, in the event he succeeds in establishing his charges, he will be awarded a preference right of entry, upon the exercise of which the present desert land entry of Atkins will be canceled.

Should the contest, for any reason, be unsuccessful, or the contestant fail to make entry under his preference right awarded him, Atkins's desert land entry will be permitted to remain intact.

The decision appealed from is accordingly affirmed as modified, and the case remanded for further proceedings, in accordance with the views herein expressed.

SARAH FRAZIER.

Decided January 10, 1913.

PROCEEDINGS BY GOVERNMENT AFTER FINAL PROOF—BURDEN OF PROOF.

Where a charge of failure to comply with the law is made by an officer of the government against a homestead entry upon which final proof has been submitted but suspended for investigation, the burden is upon the entryman to show affirmatively that the requirements of the law have been met.

ADAMS, *First Assistant Secretary*:

February 23, 1904, Sarah Frazier made homestead entry for the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 3, T. 1 S., R. 21 W., Gainesville, Florida, land district. Final proof was submitted thereon June 2, 1909, upon which action was suspended by the local officers and the proof referred to the Chief of Field Division for investigation because the showing as to residence was not satisfactory.

The land was temporarily withdrawn from all disposal, except mineral, by departmental order of May 22, 1906, and by proclamation of November 27, 1908, included within the Choctawhatchee (since changed to Florida) National Forest. No coal withdrawal appears of record.

November 1, 1910, proceedings were directed against said entry upon an adverse report submitted by a timber cruiser, upon the charge that "entrywoman did not establish and maintain a residence on the land," which charge was denied in a corroborated affidavit by her.

Hearing was had upon said charge before a clerk of court February 6, 1911, at which both parties were represented and submitted testimony, as a result of which the local officers, on February 28, 1911, rendered decision recommending rejection of the proof and cancellation of the entry, from which claimant appealed.

October 26, 1911, the Commissioner of the General Land Office rendered decision in the case, reversing that of the local officers, dismissing the proceedings against the entry, and holding the same intact. From this decision appeal to the Department has been taken by the Solicitor of the Department of Agriculture.

The decision of the Commissioner goes upon the principle that the burden of proof is upon the Government, whose officer in this case made a charge of nonresidence, to show that the entrywoman has *not* complied with the law, the statement being made therein that—

there is some ground for suspicion that residence was not maintained upon the entry to the exclusion of a home elsewhere. The testimony, however, is conflicting and it is not believed that the doubt engendered amounts to proof of noncompliance with the law.

This case, however, is one where the entrywoman has made final proof, and, in such case, the Department, as custodian of the public lands, must see to it that no title to any part of such land passes out of the Government until the law has been complied with, and the fact of such compliance must be affirmatively established by the one claiming to be so entitled.

Holding this to be the correct principle, the Department is of the opinion, after a careful reading of the record, that the evidence is against the entrywoman, that she has failed to show that she established and maintained residence on the land in the sense of really making it her home to the exclusion of a home elsewhere; that is to say, she has failed to show compliance with the law.

The decision appealed from is reversed and the entry will be canceled.

JOHN N. DEAL.

Decided January 10, 1913.

REPAYMENT—EXCESS ACREAGE.

A homestead entryman who was required to pay for the area embraced in his entry in excess of 160 acres, and was thereafter permitted to change his entry, under section 2372, Revised Statutes, to embrace other land aggregating only 160 acres, is not entitled to repayment of the amount paid by him for the excess acreage embraced in his original entry.

ADAMS, *First Assistant Secretary*:

On March 27, 1910, John N. Deal made homestead entry for the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and lots 3 and 4, Sec. 2, and lot 1, Sec. 3, T. 8 N., R. 8 E., B. H. M., Bellefourche, South Dakota, land district, containing 171.41 acres, paying therefor \$28.25, including \$14.25 for the 11.41 acres in excess of 160 acres.

On September 6, 1911, the Commissioner of the General Land Office, upon a proper showing of mistake, changed said entry and transferred said payment to the NW. $\frac{1}{4}$, Sec. 33, T. 8 N., R. 8 E., B. H. M., containing 160 acres, under authority of section 2372, Revised Statutes, as amended by the act of February 24, 1909 (35 Stat., 645).

From the Commissioner's decision of January 23, 1912, denying repayment of the excess payment of \$14.25, claimant has appealed to the Department.

The entry as first made by Deal was a lawful entry and might have been perfected upon due compliance with the homestead law. After making the entry, however, it was claimed that the tract first entered was not that examined; in other words, that the entryman had made a mistake in describing the lands he intended to enter. Under section 2372, Revised Statutes, upon proof of such a condition, the Commissioner of the General Land Office is authorized "to change the entry, and transfer the payment from the tract erroneously entered, to that intended to be entered, if unsold, but, if sold, to any other tract liable to entry."

Availing himself of this provision, the entryman applied for and was permitted to change his entry, not to the tract originally intended to be taken, because that had in the meantime been taken by another, but to a tract which, in the aggregate, covers only 160 acres, and because of this fact he now applies for repayment of what is alleged to be an excess paid on the first entry. His claim for repayment is based on section 2 of the act of March 26, 1908 (35 Stat., 48), which provides—

that in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any pay-

ment to the United States under the public land laws, in excess of the amount he is lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

Section 2372, under which this change of entry was permitted, was compiled from the act of May 24, 1824 (4 Stat., 31). Prior to the year 1880 there was no law authorizing repayment of money paid in connection with the entry of public lands. It must be clear, therefore, that the full purpose of the act of 1824 and of section 2372 was to make it possible in case of mistake that the party should receive the lands which he intended to enter, but that it was never contemplated that there should be any repayment of the moneys paid in connection with such entry. In case of mistake in the first instance, and where the party has been unable to enter the lands originally intended, and has no desire to enter further lands, no claim has ever been prosecuted for the return of the entire sum paid as a filing fee at the time of the original entry. While that question is not now before the Department, yet I think it is clear that any such request must be denied.

It follows as a consequence that there was no error committed by the Commissioner in denying the request for repayment of a portion of the filing fee where the tract taken in exchange was less than that originally entered. It must be remembered that the payment made in connection with the original entry was in strict accordance with the law and regulations and there was consequently no excess payment on account of such entry and the act authorizing a change in the entry is the limit upon the power of the Department in recognizing any supposed equities in the entryman, and as it limits him to an exchange in the lands the Department is without authority to authorize any repayment of money properly paid at the time of filing.

The decision appealed from is therefore affirmed.

H. H. TOMKINS.

Decided January 16, 1913.

RIGHT OF WAY—CANALS AND DITCHES—CONFLICTING APPLICATION.

A prior subsisting approval of a right of way under the act of March 3, 1891, will not prevent favorable action upon a second application for right of way under said act, in conflict with the approved right, where the public interest would be best subserved and protected by such course.

ADAMS, *First Assistant Secretary*:

This case involves an application by H. H. Tomkins for reservoir and ditch right of way under act of March 3, 1891 (26 Stat., 1095), which was rejected by the Commissioner of the General Land Office October 24, 1911, because of conflict with a right of way for the same purpose, approved by the Secretary of the Interior January 24, 1906,

to one M. T. Everhart, under that act, upon the same lands, being sections 21, 22, 27, 28 and 29, T. 23 S., R. 64 W., Pueblo land district, Colorado.

Upon Tomkins's appeal from the Commissioner's decision the case was remanded for field investigation and report as to such conflict and as to alleged laches and default of Everhart in the matter of his compliance with said act, section 20 thereof directing—

That if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited, as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

Such investigation has been made by a special agent of the General Land Office and the report thereon discloses that the conflict is substantial, the right of way now sought being practically the same as that approved to Everhart. The report is further to the effect that this proposed reservoir site is a shallow natural basin in the hills with a very limited drainage area; that in ordinary years some water collects in the lowest part of the basin from the adjacent hill-sides, which has been used by Everhart as a stock watering place for two or three months of each year while the water lasts, but that the construction of dams and intake ditches would be required "to render it of real value as an irrigation project;" that the said Everhart has not constructed any such dams or ditches worthy of the name, but that the present applicant, Tomkins, has done considerable construction work of that character.

The special agent forwarded with his report, however, a sworn statement by the said Everhart disputing the conclusions of the report as to the extent of his construction work and claiming such compliance with law in the matter of such work as to protect him against forfeiture of the right of way.

It is the view of the Department that, in a proper case, where the public interest would be best protected by such course, a prior subsisting approval of a right of way under the act of March 3, 1891, *supra*, creating as it does a mere easement in the property in no way affecting the fee, should not prevent favorable action upon a second application which may happen to conflict.

It is obvious that a prior approved application which has not been put to use within the time allowed by the statute, and where there is no reasonable prospect that the scheme covered by the prior application will ever be accomplished by the applicant, should not stand in the way of a development perhaps greatly needed in the locality concerned. It seems equally obvious that an application for a right of way for a larger project, which might be of the greatest possible benefit, should not be refused because of conflict with an approved right of way for a much smaller project whose advantage to the

locality and the country at large would be very much less. This does not mean that the Department, in approving the larger right of way, would attempt to revoke the approval already given for the smaller, but that the Department would put the applicants in the place where, either by agreement or perhaps by taking advantage of the condemnation laws of the State, the most complete development of the resources of the locality might be had.

I have given very careful consideration to the terms of the statute and decisions of the Supreme Court of the United States on the question of the revocability of grants of right of way by the general Government, but I do not find in them anything that forbids the granting, under the act of 1891, of a right of way which may to some extent overlap or conflict with a prior right under the same act. I therefore find no legal objection to the views above expressed. The Department should, however, act in such cases only after very careful consideration of the facts involved.

In view of Everhart's claims of compliance with law, and in order that the Department may be fully advised in this case, it is believed best before taking action upon Tomkins's application, that a hearing be had with notice to both claimants, to the end that the Department may be fully advised as to the facts, and particularly that Everhart may have opportunity to show what he has done in compliance with the law applicable.

It is, therefore, so ordered.

JUDSON v. WOODWARD.

Decided January 27, 1913.

PRACTICE—CONTEST—QUALIFICATIONS OF CONTESTANT.

Where at the time of the initiation of a contest against a homestead entry contestant met the requirements of Rules 1 and 2 of Practice, by stating that he intended to make homestead entry of the land and by showing himself qualified to make such entry, the contest will not abate merely because contestant thereafter becomes disqualified to make homestead entry of that land by exercising his right on other land.

ADAMS, *First Assistant Secretary*:

February 24, 1910, Christian W. Woodward made homestead entry for SW. $\frac{1}{4}$, Sec. 23, T. 29 N., R. 5 W., Great Falls, Montana, land district, against which, on March 23, 1912, George A. Judson filed affidavit of contest alleging that the entryman had never established his actual *bona fide* residence upon said land; that said land had been wholly unoccupied and abandoned for more than six months, and that the entry was made for the purpose of speculation.

Notice duly issued on the said contest, and the defendant filed answer denying the charges. Later, and on May 14, 1912, he filed a

motion for dismissal of the contest, for the assigned reason that the contestant had become disqualified to make homestead entry, because he had, since the filing of the contest affidavit, exercised his homestead right by making homestead entry on May 7, 1912.

It also appears that the contestant made desert land entry on April 29, 1912. The local officers recommended that the contest be dismissed for the reasons stated. However, the Commissioner of the General Land Office, in consideration of said motion, dismissed the same by decision of July 15, 1912. An appeal from that decision was filed, which the Commissioner, by decision of October 23, 1912, declined to forward to the Department. He, however, allowed Woodward twenty days from notice within which to apply to the Secretary for a writ of certiorari. The present petition has accordingly been filed, requesting that the Commissioner be directed to certify the record to the Department for consideration.

The contentions of the petitioner are based upon provisions of Rules 1 and 2 of Practice, which permit contest to be initiated by any person seeking to acquire title to or claiming an interest in the land involved, upon sufficient charges, and upon statement of the law under which applicant intends to acquire title, and facts showing that he is qualified to do so. In the case of *Holmes v. Kinsey* (40 L. D., 557), it was held with reference to said rules as follows (syllabus):

The statement and showing required of an applicant to contest by Rules 1 and 2 of Practice are designed to insure good faith on the part of would-be contestants and to prevent the filing and prosecution of speculative contests by those not qualified or who do not intend to acquire title to the lands under appropriate public-land laws, and will not prevent acceptance of an application to contest, tendered by one in all respects qualified, merely because the lands are within a temporary petroleum withdrawal and it is for that reason uncertain whether contestant can make entry thereof in event of the successful termination of the contest.

In the present case, the contestant met the requirements of the Rules of Practice by the statement that he intended to apply to make entry under the homestead law, and by showing his qualifications to make entry thereunder. The contest should not abate simply because he may have later become disqualified to make entry under that law. As stated in the decision above cited, the purpose of the said rules was to show good faith on the part of the contestant. No allegation is made that the showing was false, and the Department is unable to agree with the contention of the petitioner that the making of homestead entry by contestant for other lands, after the initiation of this contest—

is presumptive evidence that the contest was initiated for speculative purposes and that contestant became convinced that he could not maintain and prove the charges set forth in his application to contest.

The petition is accordingly denied.

C. HENRY BUNTE.

Decided January 29, 1913.

MINERAL LAND—JURISDICTION OF LAND DEPARTMENT.

The land department retains jurisdiction to consider and determine the character of land claimed under the mining laws until deprived thereof by issuance of patent; and an adjudication that land is mineral does not preclude subsequent investigation by the land department as to its character.

MINING CLAIM—DISCOVERY—ADJUDICATION OF MINERAL CHARACTER OF LAND.

An adjudication by the land department that land is mineral does not dispense with the necessity for making a discovery of mineral thereon as a basis for a mining location and patent.

ADAMS, *First Assistant Secretary*:

This is an appeal by C. Henry Bunte from the decision of the Commissioner of the General Land Office of December 2, 1911, reversing the recommendation of the register and receiver and holding for rejection his mineral application No. 2347, filed May 25, 1908, at Denver, Colorado, for the Independence, Neptune No. 2, and Georgia Rose placer mining claims, embracing the S. $\frac{1}{2}$ SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 2, T. 2 S., R. 74 W., 6th P. M.

A hearing was held upon the following charges preferred by a field officer:

1. That there has been no discovery of mineral to establish the mineral character of the land embraced in said application.
2. That the sum of \$500 has not been expended in the development and improvement of the Independence claim and the Georgia Rose claim.
3. That said application was not made for the purpose of developing the land embraced therein as a mineral claim, but for speculative purposes, and with a view to using said land for business and townsite purposes.

At the hearing the applicant demurred to the first charge upon the ground that the question of the mineral character of the land was *res adjudicata*, and the same contention is urged in the appeal to the Department. This contention is based upon the following facts: Bunte, upon June 24, 1907, made timber and stone cash entry No. 18189 (03139) for the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of the above section. The following charges were made against this entry by a field officer:

1. That said tract has no commercial value whatever for its timber and stone.
2. That said tract is within a well-known and worked mineral area.

After being served with the above charges, Bunte, upon April 20, 1908, filed a relinquishment. He thereafter applied for repayment of the purchase money, which was denied by the Commissioner August 11, 1909, the Commissioner's decision being affirmed by the Department January 24, 1910.

In the first place, it should be noticed that no formal judgment was ever rendered upon the charges made and no hearing was ever held upon them. Even if there had been a hearing and adjudication that the land was mineral in character, it would not preclude subsequent investigation on the part of the Department as to the character of the land, as it retains jurisdiction to consider and determine the character of land claimed under the mineral laws until deprived thereof by the issuance of patent. (Searle Placer, 11 L. D., 441.) The second charge made against the timber and stone entry is couched in rather indefinite language, but was construed by the Department in its decision of January 24, 1910, to mean a charge that the land was mineral in character. The charges upon their face and the language of the decisions do not disclose the particular kind of mineral claimed nor the character of the deposit, whether placer or lode. The report of the special agent upon which the charges were based, discloses that the basis of the charges were certain lode claims and lode deposits and not placer deposits. These lode claims appear also to have been largely located upon parts of the timber and stone entry not embraced in the placer application. The appellant's contention that the question as to the character of the land is *res adjudicata* is accordingly overruled. Assuming that the question of the mineral character of the land were *res adjudicata*, it should be noted that the first charge made against the mineral application, although it is not skillfully drawn, in effect alleges a failure to make a discovery. The fact that the land had been adjudicated to be mineral in character would not dispense with the necessity of making a discovery as the basis for location and mineral patent and, therefore, the question of whether a discovery had in fact been made would not be barred by a prior adjudication that the land was mineral in character.

After a careful consideration of the entire record, the Department concurs in the Commissioner's decision, that the first and second charges made against the placer application have been sustained.

The decision of the Commissioner is accordingly affirmed.

FRANK D. GRIFFIN.

Decided January 31, 1913.

INDIAN LANDS—HOMESTEAD ENTRY WITHIN FLATHEAD IRRIGATION PROJECT.

A homestead entry made under the act of April 23, 1904, as amended by the act of May 29, 1908, providing for entry of lands within the Flathead irrigation project in the former Flathead Indian reservation, may be commuted under section 2301, Revised Statutes, upon payment of the appraised price of the land; but as an entryman under said acts is required, in addition to compliance with the general homestead laws, to reclaim at least

one half of the total irrigable area of his entry for agricultural purposes, and to pay the water-right charges apportioned against the tract, final certificate should not issue until the land has been reclaimed and the charges apportioned and paid in accordance with the provisions of said acts.

ADAMS, *First Assistant Secretary*:

Frank D. Griffin has appealed from decision of January 13, 1912, by the Commissioner of the General Land Office, rejecting commutation proof submitted by him, August 21, 1911, on his homestead entry made May 26, 1910, for farm unit "B", or the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 11, T. 20 N., R. 21 W., Missoula, Montana, land district.

The land involved is a portion of the former Flathead Indian reservation, and is within the Flathead irrigation project. The entry was made under the provisions of the act of April 23, 1904 (33 Stat., 302), as amended by the act of May 29, 1908 (35 Stat., 448). The entryman established actual residence upon the land June 12, 1910. The commissioner rejected the proof because of insufficient cultivation. The proof shows that twelve and one-half acres were plowed, and one acre was planted to potatoes. He further held that the final certificate was erroneously issued, inasmuch as the law provides that, in addition to compliance with the homestead laws, the entryman must reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the land, he shall pay the water right charges apportioned against such tract. The water right charges have not been apportioned against said land, so that the entryman has not paid the water right charges. Neither has the land been reclaimed by irrigation as required by law as a condition precedent to issuance of patent. It was therefore error to issue the final certificate. The law provides that nothing in the act shall prohibit an entryman from commuting his entry under section 2301, Revised Statutes, by paying the appraised price of the land entered. The entryman in this case has paid the appraised value of the lands and the proper fees and commissions.

In support of the appeal, the entryman states that the season of 1910 was unusually dry all over the country, and especially in Montana; that the ground was baked so hard in the summer that very little plowing was done in his locality and that it was impossible for him to break his land with the one team of horses which he owned, and which, under ordinary circumstances, could easily have plowed the land; that on account of the arid condition of land in that locality it will be impossible to profitably cultivate the same until such time as water shall be placed thereon; that, in addition to the one acre of potatoes raised during the season of 1911, he sowed two acres of wheat, and harvested same, and also planted and raised a garden, all of which no mention was made in his commutation proof, for the

reason that he believed that the amount of land plowed was all he was required to give, and that it would not be necessary to state what had been raised on the land. The proof shows that the value of the improvements was \$300, as stated by the entryman. One of the proof witnesses places the value of the improvements at \$450, and the other one at \$500. In support of the appeal, the claimant states that he undervalued the improvements in his proof, as he failed to take into consideration the value of labor expended in connection therewith.

In view of all the facts and circumstances, the Department is of the opinion that the proof should be accepted, so as to relieve the claimant from further requirement of residence, but the final cash certificate must be canceled, for the reason that the cost of irrigation, which is to be apportioned against the land has not and could not have been paid by the entryman, and the land has not been reclaimed. It is accordingly directed that said certificate be canceled and that the proof be accepted, unless other objection appears.

The decision appealed from is accordingly modified.

JAMES C. GREAR.

Decided February 5, 1913.

SECOND HOMESTEAD ENTRY—ACT OF FEBRUARY 3, 1911.

The fact that a homestead entryman received for the relinquishment of his entry a small fee paid to a commissioner for executing his homestead entry papers, in addition to the filing fees paid to the local officers, will not disqualify him to make second entry under the act of February 3, 1911.

ADAMS, *First Assistant Secretary*:

October 27, 1911, James C. Grear made homestead entry No. 015829, for the SE. $\frac{1}{4}$, Sec. 29, T. 12 S., R. 24 E., Phoenix, Arizona, land district. It appears that he had formerly made homestead entry for the SW. $\frac{1}{4}$, Sec. 15, T. 15 S., R. 25 E., which was relinquished December 8, 1910. He received for his relinquishment \$16.85.

From a decision of the Commissioner of the General Land Office, dated March 29, 1912, holding his entry for cancellation upon the ground that he had received a valuable consideration for his relinquishment, in excess of the filing fees, this appeal is prosecuted to the Department.

It appears from the record and affidavit of claimant that in making his former entry he paid the register and receiver \$16 filing fees, and that he paid the commissioner before whom the papers were executed eighty-five cents for the execution thereof. Had he been able to appear before the local officers and have these papers executed, the fee

of eighty-five cents would not have been charged, but, inasmuch as this was necessary for the proper completion of his papers, to make them sufficient to file, and, as he only received for his relinquishment the amount of fees paid the commissioner, it is not believed he is disqualified under the proviso to the act of February 3, 1911 (36 Stat., 896), which provides:

Provided, That the provisions of this act shall not apply to any person whose former entry was canceled for fraud, or who relinquished his former entry for a valuable consideration in excess of the filing fees paid by him on his original entry.

It is the opinion of the Department that claimant did not receive a valuable consideration for his relinquishment, in excess of the filing fees paid by him, within the meaning of the act above cited.

The decision appealed from is reversed.

DENVER POWER AND IRRIGATION COMPANY ET AL.

RIGHT OF WAY—POWER SITE.

All projects wherein the power possibilities are such as to constitute the main factor of value should be made the subject of permits under the act of February 15, 1901, and the regulations thereunder, rather than of easements under the acts of March 3, 1891, and May 11, 1898.

Secretary Fisher to the Commissioner of the General Land Office, February 7, 1913.

On June 20, 1901, a right of way was approved to The Denver Power and Irrigation Company, granting an easement covering what is termed the Eagle Rock reservoir site, together with various appurtenant conduits, under the provisions of the act of March 3, 1891 (26 Stat., 1095), and the act of May 11, 1898 (30 Stat., 404).

Said reservoir site is situate on the South Fork of the South Platte River, south and west of the City of Denver, Colorado. Said company will be hereinafter termed the Denver Company, for convenience.

It is unnecessary to recite here all proceedings that have been since taken with reference to said easement. It suffices to state that an application conflicting with said easement was filed by W. E. Bates, applicant for the High Line reservoir site, conflicting with the southerly end of said Eagle Rock reservoir site of the Denver Company; and an application was filed by Messrs. C. P. Allen and J. E. Maloney, for what was termed the Two Forks reservoir site, conflicting at least with certain of the canals or water conduits of said easement of the Denver Company, north of the reservoir site of the Denver Company.

Messrs. Bates and Allen and Maloney alleged that the Denver Company had failed to construct its proposed works as required by the terms of the statute under which the easement was given said company, within the period of five years from approval of the easement, or at all, and asked that the Government take the necessary steps to secure a judicial declaration of forfeiture of said easement.

A hearing was ordered by your office, at which all parties appeared and submitted testimony.

The controversy was made the subject of departmental decision of September 20, 1909 (38 L. D., 207), which decision very fully stated the material facts and history of the matter up to that date.

Without here commenting upon that decision, its general effect was to affirm the decision of your office rejecting the applications of Messrs. Bates, and Allen and Maloney, above mentioned, and you were directed to prepare the record of the Denver Company's easement for submission to the Department of Justice, with view to institution of suit to forfeit said easement. That decision became final, said applications of Messrs. Bates, and Allen and Maloney were rejected, and the papers pertaining to the Denver Company's easement were transmitted to the Department of Justice.

In the meantime, on May 25, 1909, the Denver Company had filed an application under said acts of 1891 and 1898, *supra*, for what it termed an enlargement of said Eagle Rock reservoir site, which application is still pending, and the other parties mentioned also filed certain further applications which were rejected under authority of said departmental decision of September 20, 1909 (38 L. D., 207).

On December 18, 1909, a further application for what was termed the Low Line Two Forks reservoir site was filed by Messrs. Allen and Maloney; said application was rejected by your office on February 2, 1911, for supposed conflict with said outstanding easement of the Denver Company. By departmental decision of August 29, 1911, the application was remanded to your office in order that investigation might be made as to whether as an actual fact said proposed Low Line Two Forks reservoir site was in conflict with the Eagle Rock reservoir site of the Denver Company. By departmental decision of January 25, 1912, it was ordered, upon your recommendation, that your office be reinvested with jurisdiction to further consider said application of Messrs. Allen and Maloney, it appearing that there was actually no conflict on the ground between the two proposed reservoir sites, although the Low Line Two Forks reservoir site did conflict with certain of the conduits included in said easement.

It does not appear that any further or final action was taken by your office upon said application after said departmental decision of January 25, 1912.

It appears that after the rejection of the application of Mr. Bates by said departmental decision of September 20, 1909 (38 L. D., 207), an application for the same proposed High Line reservoir site was filed by the High Line Reservoir and Irrigation Company, of which Mr. Bates was president; that said second application was rejected by departmental decision of September 27, 1910 (unreported); that soon thereafter said company filed still a further application, for the same site, which your office declined to consider, and by your decision of August 1, 1911, you returned the papers to the company.

This general matter and the controversy between Mr. Bates, the High Line Reservoir and Irrigation Company, Messrs. Allen and Maloney and the Denver Company, have been given much consideration by the Department, and have been made the subject of numerous oral arguments by counsel for the various persons and companies interested, and of many conferences between officers of different bureaus of this Department.

During the pendency of these proceedings the Denver Company asked that it be permitted to surrender its outstanding easement, without litigation, and that thereupon its application for said enlarged Eagle Rock reservoir site be approved.

All the applications hereinabove mentioned were filed under the provisions of said act of March 3, 1891 (26 Stat., 1095), and of said act of May 11, 1898 (30 Stat., 404), supplemental to the earlier statute.

Said statutes provide for the granting of an easement to applicants, under certain conditions, subject to the condition that the works be constructed within five years after the granting of the easement, it being required that the application shall be for the *main* purpose of irrigation.

The project of the Denver Company has been asserted by the company to be primarily an irrigation project, but after investigation by the Director of the Geological Survey the Director reports that this project, while possessing possible value for irrigation, is much more valuable for its power possibilities, and can not, in his opinion, be classed otherwise than as a power project.

In the exercise of its discretionary power in the premises, this Department believes that sound administrative policy dictates that all projects wherein power possibilities are such as to constitute the main factor of value, should be made the subject of permits under the act of February 15, 1901, *supra*, and regulations thereunder, rather than of an easement under the provisions of the acts of March 3, 1891, and of May 11, 1898, *supra*, thereby preserving a greater element of governmental control than might be possible after granting of an easement.

With this policy in mind it is believed that any rights accorded the Denver Company should be under a permit under said act of

February 15, 1901, *supra*, for some reasonable term, and with such conditions attached as it may seem proper to lay upon the company.

Comparison of the probable estimated value of the various projects mentioned, and the weighing of one with another, has brought the Department to the opinion that the present project of the Denver Company offers much greater probable benefit to the community wherein the land involved is situated than do the other projects noted.

The topographic situation in the immediate vicinity, considered with the probable water supply, and with existing water rights and projects of the locality, make it appear advisable, if not imperative, that the possible utilization of the flood waters of both the South Fork and the North Fork of the South Platte River be brought under one control to an extent obviously impossible if the application of Mr. Bates or of the High Line Reservoir and Irrigation Company or of Messrs. Allen and Maloney were approved. As above suggested, also, the Department is disinclined at present to approve any application covering the great possibilities of this location, under the act of 1891, providing for the granting of an easement.

This Department is informed by the Department of Agriculture that the Denver Company has filed with the Forest Service an application for a right of way permit under said act of February 15, 1901 (31 Stat., 790), covering said enlarged Eagle Rock reservoir site; that said application has been examined under the regulations of the Forest Service, and that the Department of Agriculture is prepared to issue such permit, with certain conditions attached covering the time within which construction work must be commenced and finished, and covering any use of the project for generation of electric power.

Under the existing practice, the land in question being within the Pike National Forest, the Department of Agriculture has jurisdiction to issue a permit under the act of February 15, 1901, covering the Eagle Rock reservoir site.

The Denver Company has filed in this Department a formal surrender of its said outstanding easement, and has formally waived and withdrawn its said application filed May 25, 1909 (Denver 02202), under the act of 1891.

In view of the Department entertaining the belief that the greatest public good will be served by permitting construction under the project of the Denver Company, and in order that this long pending matter may be forthwith brought to a final determination, the papers relating to the pending application of Messrs. Allen and Maloney, and also certain of the papers relating to the applications of the High Line Reservoir and Irrigation Company have been forwarded by

your office for consideration, although in the ordinary course of business action would be taken by your office upon the application of Messrs. Allen and Maloney before returning the papers to the Department. As all parties have been repeatedly heard, however, it is not thought that any injustice will be done by now taking final action.

In view of all the foregoing it is hereby ordered and adjudged:

1. That the pending application of Messrs. Allen and Maloney, for the Low Line Two Forks reservoir site (Denver 011882) or any other filings or applications which may possibly have been later made, covering said proposed reservoir site, be, and the same are hereby finally rejected; and you will cause proper notations of this rejection to be made upon the records of your office and give necessary instructions for the making of such notations upon the records of the Denver land office.

2. That neither W. E. Bates nor the High Line Reservoir and Irrigation Company have any rights in the premises, and that your decision of August 1, 1911, declining to consider any renewal of the application by Mr. Bates or by said company, is hereby formally affirmed.

3. That the easement heretofore granted to The Denver Power and Irrigation Company by approval of June 20, 1901, under the acts of March 3, 1891 (26 Stat., 1095), and of May 11, 1898 (30 Stat., 404), is hereby canceled upon the formal surrender thereof filed with this Department by said company, and you will cause proper notations to be made of such cancellation.

4. That the application of The Denver Power and Irrigation Company, filed in the Denver land office May 25, 1909 (Denver 02202), for the enlarged Eagle Rock reservoir site, under said acts of March 3, 1891, and May 11, 1898, is hereby rejected and canceled, upon the waiver and withdrawal of said application filed by said company, and proper notations of this action will also be made.

This action clears the entire record of all pending claims of The Denver Power and Irrigation Company, of Messrs. C. P. Allen and J. E. Maloney, and of Mr. W. E. Bates, and of the High Line Reservoir and Irrigation Company before this Department, thereby leaving the land clear and open for the exercise by the Department of Agriculture of its discretionary power to issue a permit to the Denver Company for its said reservoir site if said Department deems such action proper, as to which this Department expresses no opinion.

A copy of this decision is sent to the Department of Agriculture for its information in the premises.

CLASSIFICATION AND VALUATION OF PUBLIC COAL LANDS.

REGULATIONS.

February 20, 1913.

I. CLASSIFICATION.

1. Land shall be classified as coal land if it contains coal having—

(a) A heat value of not less than 8,000 B. t. u. on an air-dried, unwashed or washed, unweathered mine sample.

(b) A thickness of or equivalent to 14 inches for coals having a heat value of 12,000 B. t. u. or more, increasing 1 inch for a decrease from 12,000 to 11,000 B. t. u., 1 inch for a decrease from 11,000 to 10,500 B. t. u., 1 inch for each decrease of 250 B. t. u. from 10,500 to 10,000, and 1 inch for each decrease of 100 B. t. u. below 10,000.

(c) A depth below the surface for a bed of coal 6 feet or more thick of not more than 100 feet for each 300 B. t. u. or major fraction thereof, and for a bed of minimum thickness for that coal a depth of not more than 500 feet, and for beds of any thickness between the minimum and 6 feet a depth directly proportional to that thickness within these limits, provided that, if the coal lies below the depth limit but within a horizontal distance from the surface not exceeding 10 times the depth limit, or if its horizontal distance from the foot of a possible shaft (not deeper than the depth limit) plus 7.5 times the depth of such shaft does not exceed 10 times the depth limit, the land shall be classified as coal land; provided, further, that the depth limit shall be computed for each individual bed, except that where two or more beds occur in such relations that they may be mined from the same opening the depth limit may be determined on the group as a unit, being fixed at the center of weight of the group, no coal that is below the depth limit thus determined to be considered.

2. Classification shall be made by quarter-quarter sections or surveyed lots, except that for good reason classification may be made by $2\frac{1}{2}$ -acre tracts or multiples thereof described as minor subdivisions of quarter-quarter sections or rectangular lotted tracts.

II. VALUATION.

3. For purposes of valuation the price per ton for a noncoking, nonanthracite coal 6 to 10 feet thick shall be one-tenth of a cent for each 1,250 B. t. u.:

(a) Provided that the price per ton may be increased by not more than 100 per cent if the coal is coking, smokeless, or anthracitic or has other enhancing qualities; or it may be decreased for high sulphur or ash, friability, or nonstocking or other qualities that reduce the value; and

(b) Provided, further, that if the coal in one bed is over 10 feet thick the price on each foot above 10 feet shall be reduced 1 per cent for each such foot (thus the reduction will be 1 per cent on the eleventh foot, 2 per cent on the twelfth foot, and so on); or if the coal is less than 6 feet thick the price shall be reduced by multiplying the normal value by $\frac{4+t}{10}$, where t equals thickness in feet; and

(c) Provided that where the thickness of any bed varies irregularly its computed thickness (CT) over any area shall be equal to the

average of the measurements (AM) less the sum of the differences between each measurement and the average of the measurements (SD) divided by the sum of the measurements (S):

$$CT = AM - \frac{SD}{S}$$

4. The value of any acre within 15 miles of a railroad in operation shall be determined at the rate per ton prescribed above on an estimated recoverable tonnage of 1,000 tons to the acre-foot:

Provided that if the coal is in several beds having an aggregate thickness of more than 10 feet if beds less than 6 feet thick are considered at the reduced thickness as prescribed above, the value due to each foot above 10 feet shall be reduced 1 per cent for each such foot (as in computing the price per ton on a single thick bed) up to a thickness of 80 feet, above which any additional thickness shall be valued at 30 per cent of the normal value.

5. This price shall be decreased one-half if the land is more than 15 miles from a railroad in operation, or if it is within that limit but inaccessible owing to topographic conditions; but no land shall be valued at less than the legal minimum price, nor shall the price of any land exceed \$300 an acre except in districts which contain large coal mines and where the character and extent of the coal are well known.

6. Within the above restrictions a graded allowance shall be made for increasing depth, and allowance may be made for any special conditions enhancing or diminishing the value of the land for coal mining.

7. If only a part of a smallest legal subdivision is underlain by coal the price per acre shall be fixed by dividing the total estimated coal values by the number of acres in the subdivision, but this price shall not be less than the minimum provided by law.

8. When lands which were at the time of classification more than 15 miles from a railroad are brought within the 15-mile limit by the beginning of operation of a new road, all values given in the original classification shall be doubled by the register and receiver.

9. Review of classification or valuation may be had only on application therefor to the Secretary, accompanied by a clear and specific statement of conditions not existing or not known to exist at the time of examination.

WALTER L. FISHER,

Secretary.

MATTHEW L. KAGLE.

ENLARGED HOMESTEAD—CULTIVATION.

The provision in paragraph 18 of the instructions of July 15, 1912, under the three-year homestead act of June 6, 1912, that where good faith appears, proof may be accepted if it shows cultivation of at least one-sixteenth in one year and at least one-eighth in the next and each succeeding year until final proof, without regard to the particular year of the homestead period in which the cultivation of the one-sixteenth was performed, is applicable to entries made under sections 1 to 5 of the enlarged homestead act of February 19, 1909, as well as to homestead entries under sections 2289 to 2291 of the Revised Statutes.

CULTIVATION—SUMMER FALLOWING.

Summer fallowing can not be accepted as the equivalent of cultivation under the homestead laws.

*Secretary Fisher to the Commissioner of the General Land Office,
February 25, 1913.*

Your letter of February 6, 1913, reports that you have under consideration the appeal of one Matthew L. Kagle from the decision of the register and receiver rejecting proof submitted on homestead entry 010190, Roswell, New Mexico, act of February 19, 1909, for a tract of 320.85 acres; that the evidence as to the residence of the entryman and improvements placed by him upon the land is satisfactory but that the proof of cultivation shows only 6 acres cultivated during the year 1910, 20 acres in 1911, and approximately 40 acres in 1912. Referring to the act of June 6, 1912 (37 Stat., 123), and paragraph 18 of instructions of July 15, 1912 (41 L. D., 103), you express the opinion that your office must reject the proof submitted because of insufficient showing of cultivation.

Sections 1 to 5 inclusive of the act of February 19, 1909, *supra*, require the cultivation of at least one-eighth of the area entered during the second year after entry and of at least one-fourth of the land in the entry beginning with the third year thereof. This was modified by the act of June 6, 1912, *supra*, to the extent of permitting final proof to be offered in such cases upon a showing of three years' residence and cultivation and of submission of evidence that not less than one-sixteenth of the area entered had been cultivated during the second year of the entry and not less than one-eighth during the third year and until final proof.

In issuing instructions under the act of June 6, 1912, the Department, realizing that it might be impossible for the persons who had made homestead entries prior to June 6, 1912, to submit evidence that they had cultivated one-sixteenth of the area beginning with the second year and one-eighth beginning with the third year of the entry, stated in paragraph 18 of the instructions that where the good faith of the entryman should appear, proof might be accepted if it

shows cultivation of at least one-sixteenth in one year and at least one-eighth in the next year and each succeeding year until final proof without regard to the particular year of the homestead period in which the cultivation of the one-sixteenth was performed. This provision is applicable to entries made under sections 1 to 5 of the act of February 19, 1909, as well as to homestead entries made under sections 2289 to 2291 of the Revised Statutes. Therefore, where proof in such cases shows good faith and cultivation as set out in said paragraph 18 of the instructions, the Department is aware of no reason why same may not be accepted. In this connection your attention is directed to the holding in paragraph 4 of the circular of July 15, 1912, that "summer fallowing can not be accepted as the equivalent of cultivation and this was equally true of the old laws which required the land to be cultivated to agricultural crops other than native grasses." It is suggested that your office proceed with the adjudication of the case before it, according to the entryman, if decision be adverse, the usual right of appeal to the Department, whereupon the case will receive consideration.

RIGHTS OF WAY FOR POWER PURPOSES THROUGH PUBLIC LANDS AND RESERVATIONS (EXCEPT NATIONAL FORESTS).

REGULATIONS.

GENERAL STATEMENT.

1. The act of February 15, 1901, chapter 372 (31 Stat., 790), entitled "An act relating to rights of way through certain parks, reservations, and other public lands," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more

of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of the said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided, further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

2. This act, in general terms, authorizes the Secretary of the Interior, under regulations to be fixed by him, to grant permission to use rights of way through the public lands, forest, and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks in California, for every purpose contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat., 1095, 1101), and by acts of January 21, 1895 (28 Stat., 635), May 14, 1896 (29 Stat., 120), and May 11, 1898 (30 Stat., 404), and for other purposes additional thereto, *except for tramroads, the provisions relating to tramroads, contained in the act of 1895 and in section 1 of the act of 1898, aforesaid remaining unmodified and not being in any manner extended.*

3. Although this act does not expressly repeal any provision of law relating to the granting of permission to use rights of way contained in the acts referred to, yet in view of the general scope and purpose of the act, and of the fact that Congress has, with the exception above noted, embodied therein the main features of the former acts relative to the granting of a mere permission or license for such use, it is evident that, for purposes of administration, the later act should control in so far as it pertains to the granting of permission to use rights of way for purposes therein specified. Accordingly, all applications for permission to use rights of way for the purposes specified in this act must be submitted thereunder. Where, however, any canal or ditch company formed for the purpose of irrigation, any individual, or association of individuals, seeks to acquire a right of way for irrigation canals, ditches, or reservoirs, under said sections of the act of March 3, 1891, and section 2 of the act of May 11, 1898, *supra*, the application must be submitted in accordance with the regulations issued under said acts.

4. By section 1 of the act of February 1, 1905 (33 Stat., 628), it is provided:

That the Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of

the act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands.

5. Under this section it has been determined that the Department of Agriculture is invested with jurisdiction to pass upon all applications under the said act of February 15, 1901, for permission to occupy and use lands in national forests.

6. Therefore when it is desired to obtain permission to use a right of way over public lands within a national forest, an application should be prepared in accordance with the regulations issued by the Department of Agriculture and the same submitted to the proper officer of that department, as in these regulations more fully set forth.

7. Any occupancy or use of public lands, reservations, parks, or national forests for the purposes set forth in the statute, except under authority first secured from the proper department, is trespass.

8. The statute does not make a grant in the nature of an easement, but authorizes a mere permission revocable at any time, and it gives no right whatever to take from public lands, reservations, parks, or national forests adjacent to the right of way any material, earth, or stone for construction or other purpose.

9. Permission may be given under this statute for rights of way through unsurveyed as well as surveyed lands.

10. Public lands of the United States chiefly valuable for power purposes are from time to time withdrawn from settlement, location, sale, or entry and reserved for power purposes under the withdrawal act of June 25, 1910 (36 Stat., 847), as amended by act of August 24, 1912 (37 Stat., 497), or under sections 13 and 14 of the omnibus Indian act of June 25, 1910 (36 Stat., 855). Such reservation not only effects retention of the lands in Government ownership, but relieves the eventual permittee from the necessity of dealing with the numerous patentees or claimants that would otherwise succeed to the ownership, and provides for a more permanent right of way than could otherwise be secured from the United States under existing law. On approval of a power project under the following regulations, modification of the withdrawal to allow the issuance of the necessary permit is secured, so that the withdrawal in no way interferes with power development. It is suggested, therefore, that prospective applicants under these regulations furnish to the Director of the Geological Survey, Washington, D. C., at the earliest possible stage of operations, an approximate description by legal subdivisions of the land affected, together with a brief statement of the extent of the power resources involved and a request that a withdrawal be made. Such requests will be given

immediate attention to the end that the unreserved lands affected may be withdrawn in so far as they are found to possess value for power purposes.

11. The following regulations govern the issuance of permits under the said act of February 15, 1901, that involve the use of or interference with valuable power resources or that involve rights of way for the development, transmission, or use of power. They are a revision of and supersede regulations on the same subject, approved August 24, 1912 (41 L. D., 150), which superseded sections 37-45, inclusive, of the "Regulations concerning right of way over public lands and reservations for canals, ditches, and reservoirs, and use of right of way for various purposes," approved June 6, 1908 (36 L. D., 579-583), so far as they relate to permits that involve the use of or interference with valuable power resources or that involve rights of way for the development, transmission, or use of power. Permits under said act that do not involve the use of or interference with valuable power resources and that do not involve rights of way for the development, transmission, or use of power are issued in accordance with the said sections of the regulations of June 6, 1908.

REGULATIONS.

REGULATION 1. Preliminary power permits issued by the Secretary of the Interior allow the occupancy of the public lands and reservations of the United States (except national forests) and of the Yosemite, Sequoia, and General Grant National Parks, all hereinafter called "Interior Department lands," for the purpose of securing the data required for an application for final permit. Final power permits issued by the Secretary of the Interior allow the occupancy and use of Interior Department lands for the construction, maintenance, and operation of works that involve the use of or interference with valuable power resources or that involve the development, transmission, or use of power. All permits will be issued, extended, renewed, or revoked only by the Secretary of the Interior, hereafter in these regulations called "the Secretary."

REG. 2. Application for preliminary or final power permits for occupancy or use of lands of the United States should be submitted as follows:

For Interior Department lands: To the local land office of the land district in which the lands are situated. If the lands are situated in more than one district, the lands in both districts shall be embraced in one set of application papers, which shall be submitted in any one of such districts at the option of the applicant, who shall submit to the local land office in each of the other districts a print copy of the maps submitted to the local land office of the first district.

For national forest lands: To the district forester of the district in which the lands are situated, unless otherwise directed by the regulations of the Department of Agriculture.

For lands in part national forest lands and in part Interior Department lands: In the same manner as for national forest lands, but the applicant shall also submit to the local land office in the land district in which the Interior Department lands are situated such maps and papers and copies thereof as are required in these regulations.

REG. 3. Priority of consideration of applications for final power permits shall be initiated in the order of filing complete applications whether such applications shall be for preliminary permit as prescribed in regulation 10 or for final permit as prescribed in either regulation 11 or regulation 12. If a preliminary permittee shall file such complete application for final permit before loss of priority initiated by the application for preliminary permit, the priority so initiated shall be maintained by the application for final permit and be effective as of the date of the application for the preliminary permit. Priority shall be maintained, however, only in so far as the projects shown in the application for final permit are within the approximate limits of diversion and discharge as shown in the application for the preliminary permit. Priority initiated or maintained by an application for final permit shall be lost if the applicant fails to make the payment required and to return a duly executed agreement, as prescribed in regulation 14 or in regulation 15, within 90 days from a date fixed in the letter transmitting such agreement to him, unless a longer time is allowed by written authority of the Secretary. Priority initiated by an application for preliminary permit shall be lost: (1) if the initial payment is not made within 60 days of demand therefor; or (2) if the application for final permit is not filed within the time required in the preliminary permit. Priority initiated or maintained by an application for a permit shall be lost if the permit is revoked. No other application either preliminary or final, for a like use covering in whole or in part the same or adjacent lands, will be accepted from the permittee whose priority is lost until the expiration of one year thereafter; and this restriction shall extend to transferees of the permittee and, if the permittee is a corporation, to reincorporations representing the same or associated interests, whenever in the judgment of the Secretary a transfer or reincorporation has been effected for the purpose or with the result of escaping the restriction of this regulation, it being the intent of such restriction to leave open to other applicants for a period of one year power sites upon which priorities have lapsed as provided in this regulation.

REG. 4. Final power permits will be issued only in case it appears that the proposed development will be in general accord with the

most beneficial utilization of the resources involved and consistent with the public interest. No final power permit will be issued if the works to be constructed thereunder would in any way be incompatible with works operated or constructed or to be constructed under an existing final power permit. No final power permit will be issued for the construction of works within an area covered by a prior preliminary permit until after the filing of final application or the loss of priority by the prior preliminary permittee. Applications for final power permits involving in whole or in part the same lands will be examined in order of their priority, but before the issuance of final permit consideration may be given, in the discretion of the Secretary, to the financial ability and business connections and affiliations of the applicants. Successive preliminary permits may be issued covering the same power site, but in each successive preliminary permit it shall be specified that such permit is subordinate to all outstanding prior permits and shall not adversely affect any rights thereunder.

REG. 5. The applicant must file as a part of his application the evidence of initiation of water appropriation in these regulations hereafter required. Thereafter no protest against the issuance of a permit, if based upon alleged lack of water rights, will be considered; nor, in general, will any allegation that the time of beginning or completion of construction has been or is delayed by litigation over water rights be accepted as a sufficient reason for granting any extensions of time. Wherever the approval or permission of one or more State agencies is required by the State law as a condition precedent to the applicant's right to construct or operate or to take or use water in the operation of the works described in any application for a final power permit, duly certified evidence, in duplicate, of the approval or permission so required must be filed before issuance of such permit.

REG. 6. Unless sooner revoked by the Secretary, a final power permit shall terminate at the expiration of 50 years from the date of the permit. If, however, at any time not less than 2 nor more than 12 years prior to the termination of the permit, the permittee shall formally notify the Secretary that he desires a new permit to occupy and use such lands as are occupied and used under the existing permit, and will comply with all then existing laws and regulations governing the occupancy and use of lands of the United States for power purposes, the existing permit will be considered as an application for such new permit.

REG. 7. The following terms, wherever used in these regulations, shall have the meaning hereby in this regulation assigned to them, respectively, viz:

"Municipal purposes" means and includes all purposes within municipal powers as defined by the charter of the municipal corporation, where any such purpose is directly pursued by the municipal

corporation itself with the primary object of promoting the security, health, good government, or general convenience of its inhabitants.

"Power business" means the entire business of the applicant or permittee in the generation, distribution, and delivery of power by means of any one power system, together with all works and tangible property involved therein, including freeholds and leaseholds in real property.

"Power system" means all interconnected plants and works for the generation, distribution, and delivery of power.

"Power project" means a complete unit of power development, consisting of a power house, conduit or conduits conducting water thereto, all storage or diverting or fore-bay reservoirs used in connection therewith, the transmission line delivering power therefrom, any other miscellaneous structures used in connection with said unit or any part thereof, and all lands the occupancy and use of which are necessary or appropriate in the development of power in said unit.

"Project works" means the physical structures of a power project.

"Construction of the project works" means the actual construction of dams, water conduits, power houses, transmission lines, or some permanent structure necessary to the operation of the complete power project, and does not include surveys or the building of roads and trails, or the clearing of reservoir sites or other lands to be occupied, or the performance of any work preliminary to the actual construction of the permanent project works.

"Operation period" means the period covered by final permit subsequent to the actual beginning of operation.

"Survey-construction period" means the period covered by preliminary and final permits prior to the operation period.

"Nominal stream flow" means the sum of (a) the average of the values estimated for the mean natural flow for the two-month (calendar) minimum-flow period in each successive five-year cycle or major fraction thereof, and (b) the increase in such average due to artificial means other than the project works.

"Project storage flow" means the estimated increase in nominal stream flow made practicable by the project works.

"Available stream flow" means the sum of nominal stream flow and project storage flow.

"Load factor" means the ratio of average power output to maximum power output.

"Total capacity of the power site" means the power estimated to be available for transmission, and is determined as the continued product of (1) the factor 0.08¹; (2) the average effective head, in feet; (3) the available stream flow at the intake (in second-feet and in

¹ The factor 0.08 represents the horsepower at 70 per cent efficiency of a second-foot of water falling through a head of 1 foot.

amount not to exceed the maximum hydraulic capacity of the project works); and (4) a factor, not less than the average load factor of the power system, representing the degree of practicable utilization of the available stream flow, and based on the extent of practicable fore-bay storage and the load factor of the power system.

"Net capacity of the power site" means the capacity on which the calculation of the compensation hereinafter required to be paid is based, and is determined by making a deduction from the total capacity of the power site which, in per cent, shall be the product of the square of the distance of primary transmission in miles and the factor 0.001, but in no case shall such deduction exceed 25 per cent.

REG. 8. The occupancy and use of Interior Department lands (otherwise than by transmission lines) under a preliminary or final power permit for power sites of more than 100 horsepower total capacity (except permits exclusively for municipal purposes, for irrigation, or for temporary construction of project works as in this regulation hereafter specified) will be conditioned on the payment in advance for each calendar year of compensation calculated from the "net capacity of the power site," as defined in regulation 7, at not less than the following rates per horsepower per year:

For the unexpired portion of the calendar year and for the first full calendar year of the survey-construction period, and similarly for the operation period	\$0. 01
For the second full calendar year of each of said periods.....	. 02
For the third year.....	. 03
For the fourth year.....	. 04
For the fifth year.....	. 05
For the sixth year.....	. 06
For the seventh year.....	. 07
For the eighth year.....	. 08
For the ninth year.....	. 09
For the tenth and each succeeding year.....	. 10

The rates per horsepower per year will be ten times such minimum rates, however, unless good cause for fixing other rates appears.

The occupancy and use of Interior Department lands by transmission lines will be conditioned on the payment in advance for each calendar year of compensation to be fixed by the Secretary and specified in each permit according to the circumstances in each case.

The compensation on account of a preliminary power permit will be calculated from the net capacity of the power site as estimated by the Secretary at the time of granting such permit. The compensation on account of a final power permit will be calculated from the net capacity of the power site as estimated by the Secretary at the time of granting said final permit, provided that said estimated net capacity may be adjusted by the Secretary annually to provide

for changes in length of primary transmission, for increase or decrease, by storage or otherwise, of available stream flow to an amount of 10 per cent or more, or for increase or decrease of 10 per cent or more in average effective head, or in degree of practicable utilization.

The first payment by every permittee shall be the compensation for a full year, but any excess of said payment over the pro rata compensation for the unexpired portion of the calendar year in which the permit is issued will be credited to the permittee as a part of his payment for the first full calendar year.

All payments made for the survey-construction period will be credited to the permittee for the cancellation of charges as they become due in the operation period.

No compensation will be required for the occupancy and use of Interior Department lands under a preliminary or final power permit authorizing such occupancy and use exclusively for municipal purposes, for irrigation, or for the temporary development of power to be used in the construction of permanent project works under permit issued to the same permittee. All free permits issued under this paragraph will be subject to such special conditions as the Secretary may deem necessary in each case to fully protect the consumers of power for such municipal purposes and irrigation.

If all or any part of the amounts due for compensation as required in the preliminary permit shall, after due notice has been given, be in arrears for 60 days, then and thereupon the preliminary permit shall terminate and be void and will be formally revoked by the Secretary. If all or any part of the amounts due for compensation, as required in the final permit, shall, after due notice has been given, be in arrears for six months, then and thereupon the final permit shall terminate and be void and will be formally revoked by the Secretary.

At any time not less than 10 years after the issuance of final permit, or after the last revision of rates per horsepower per year thereunder, the Secretary may review such rates and impose such new rates per horsepower per year as he may decide to be reasonable and proper: *Provided*, That the new rates shall not be so great as to result in reducing the margin of income from the project over estimated and proper expenses (including reasonable allowance for repairs and renewals) to an amount which, in view of all the circumstances (including fair promotion costs and working capital) and risks of the enterprise (including obsolescence), is unreasonably small; but the burden of proving such unreasonableness shall rest upon the permittee.

The decision of the Secretary shall be final as to all matters of fact upon which the calculation of the capacities or compensation depends.

REG. 9. All applications for power permits, whether preliminary or final, to occupy and use Interior Department lands under these regulations shall, if the applicant be an individual, be accompanied by an affidavit by the applicant that he is a citizen of the United States. If he is not a native-born citizen he must submit the usual proofs of naturalization. If the applicant is an association of citizens, each member must make affidavit of citizenship, and a complete list of the members must be given in an affidavit by one of them. Associations must, in addition, submit their articles of association; if there be none, the fact must be stated over the signature of each member of the association. Applications by individuals or associations must also be accompanied by the information called for in paragraph (G) of this regulation.

If the applicant is an incorporated company, its application must be accompanied by the papers below in this regulation specified:

(A) A copy of its articles of incorporation, duly certified by the proper officers of the company under its corporate seal or by the secretary of the State where organized.

(B) A copy of the State law under which the company was organized (if it was organized under State law), with certificate of the governor or secretary of the State, under seal, that the same was the law at the date of incorporation. (See par. (H) of this regulation.)

(C) If the State law directs that the articles of incorporation or other papers connected with the organization be filed with any State officer, there must be submitted the certificate of such officer that the same have been filed according to law, and giving the date of the filing thereof.

(D) When a company is operating in a State other than that in which it is incorporated, it must submit the certificate of the proper officer of the State that it has complied with the laws of that State governing foreign corporations to the extent required to entitle the company to operate in such State.

(E) An official statement, by the proper officer, under the seal of the company, that the organization has been completed, that the company is fully authorized to proceed with construction according to the existing law of the State in which it is incorporated, and that the copy of the articles filed is true and correct.

(F) A true list, signed by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the items by this regulation required.

(G) A copy of the State laws governing water rights, with the certificate of the governor or secretary of the State that the same is the existing law.

(H) If certified copies of the existing laws regarding corporations and irrigation, and of new laws as passed from time to time, be for-

warded to the General Land Office by the governor or secretary of the State, the applicant may file, in lieu of the requirements of paragraphs (B) and (G) of this regulation, a certificate of the governor or secretary of state, under seal, that no change has been made since a given date, not later than that of the laws last forwarded.

REG. 10. All applications for preliminary permits to occupy and use Interior Department lands for the purpose of securing the data required for an application for final permit for power projects of more than 100 horsepower total capacity shall consist of the following items (in addition to those specified in regulation 9), each of which shall be dated and signed by the applicant:

(I) An application in quadruplicate, on Form 3.

(J) A map, in duplicate, on tracing linen, and two print copies, cut to a uniform size and not larger than 28 by 40 inches and not smaller than 24 by 36 inches, with scale so selected as to show upon a single map the power project or projects applied for, showing the approximate location of the dams, reservoirs, conduits, power houses, and other project works. The map shall show: All lines of public land subdivisions by official survey and the protractions on unsurveyed lands of section and township lines, such protractions in any national forest conforming to the diagram accompanying the proclamation establishing the boundaries of such national forest: for each reservoir site, the distance and bearing of one extremity of the dam from the nearest existing corner of the public survey and approximately the position of the maximum-flow line; and for each water-conduit line, the distance and bearing of each terminus from the nearest existing corner of the public survey and the approximate location of the conduit. If on unsurveyed land, the distances and bearings may be taken from a permanent mark on some natural object or permanent monument that can be readily found and recognized.

(K) Estimates in quadruplicate for each power project of (1) the total average effective head to be utilized, and the per cent thereof to be obtained from dam and from water conduit, respectively; (2) the stream flow, and the per cent thereof to be made available from storage by the project works and by other works, respectively; (3) the area to be flooded by backwater from the diversion dam; (4) the length of the proposed water conduit (from intake to tailrace outlet); (5) the area and available capacity of each proposed storage reservoir; (6) the probable load factor of the power system; and (7) the distance, in miles, of proposed primary transmission.

These estimates should be accompanied by complete statements in detail of all data on which they are based, including stream measurements, rainfall, stream flow and evaporation records, drainage areas, probable points of delivery of power, and any other pertinent information.

(L) A duly certified copy of such notice or application, if any, as is required to be posted or filed, or both, to initiate the appropriation of water under the local laws. This notice or application should provide for use, by the applicant for a power permit or by his predecessors, of sufficient water for the full operation of the project works.

Application must be made for the occupancy and use of such lands for a definite, limited period only, which period will allow a reasonable time for the preparation and filing of the final application as prescribed in regulation 11. The time prescribed in the preliminary permit may, upon application, be extended by the Secretary if the completion of the final application has been prevented by unusual climatic conditions that could not reasonably have been foreseen or by some special or peculiar cause beyond the control of the permittee.

An application for a preliminary power permit shall not be complete until every map or paper required by regulation 9 and by this regulation shall have been filed in the form prescribed.

REG. 11. All applications for final permits to occupy and use Interior Department lands for power projects of more than 100 horsepower total capacity shall consist of the following items (in addition to those specified in regulation 9):

(I) An application in quadruplicate, on Form 5.

(J) Maps of location, in duplicate, on tracing linen, and plans of structures on tracing linen, with two print copies of each map and plan cut to uniform size not larger than 28 by 40 inches and not smaller than 24 by 36 inches with graphical scale not less than 6 inches in length drawn thereon. Separate sheets, numbered consecutively, shall be used for maps whenever the whole survey can not be shown upon a single sheet, and each sheet shall contain a small diagram showing the entire map and indicating the portions shown on each sheet. Each separate sheet of maps and plans shall contain an affidavit of the applicant's engineer and a certificate of the applicant in form prescribed by the Secretary. (See Form 6.) The maps shall show reference lines that can at all times readily be retraced to initial points of survey, to termini of water conduits, to termini of transmission lines (when within 2 miles of Interior Department lands, measured along the proposed right of way), and to intersections of surveys with boundaries of national forests and other reservations of the United States; all lines of public land subdivisions by official survey and the protractions on unsurveyed lands of section and township lines, such protractions in any national forest conforming to the diagram accompanying the proclamation establishing the boundaries of such national forest; and the status as to ownership of all lands of the power project or projects, designating separately lands patented, lands of the United States entered or otherwise embraced in any unperfected claim under the public-land laws, unreserved lands of

the United States, and, separately for each reservation, lands included within national forests and other reservations of the United States. Elevations and contour lines shall be based on United States Geological Survey datum whenever available.

(1) The following maps and plans shall be submitted for each reservoir that will be a part of the power project or projects applied for: (a) A contour map of each reservoir site, dam, and dam site on a scale of not more than 400 feet to the inch, with a contour interval of not more than 10 feet. The contour map for each reservoir site shall show the high-water flow line and, in case the reservoir is to be used in whole or in part for diversion purposes, the flow line fixed by the estimated average effective head, and also a table of areas and capacities for each flow line and each contour line. (b) A cross section of each dam site along the center line of the proposed dam, with a graphical log properly located thereon of each boring, test pit, or other exploration, and a brief statement of the character and dip of underlying material. (c) Plans, elevations, and cross sections of the dams, showing spillways, sluiceways, or sluice pipes, and other outlet works; and also a statement of the volume of the dam, the character of the materials used, and the type of construction.

(2) The following maps and plans shall be submitted for the entire length of each water conduit, from intake to tailrace outlet, that will be a part of the power project or projects applied for: (a) A contour map of the entire water-conduit location, except pipe lines and tunnels, on a scale of not more than 400 feet to the inch, with contour interval of not more than 10 feet and a profile of the pipe lines and tunnels. The contours shall cover either an area of 100 feet in width on each side of the center line of the water conduit or a difference in elevation of at least 25 feet above and below the grade line of the conduit. This map shall show the transit line of the survey and the center line of the proposed final location of the water conduit, including curves between tangents, and the distance from the nearest section or quarter-section corner of the intersection of the transit line with section lines. This map shall also show what sections of the water conduit will be in flume, ditch, tunnel, pipe, etc., and the grade of each section. (b) Plans, elevations, and cross sections of each type of water conduit, showing material, dimensions, grades, flow line, and capacity and plans and elevations of intake works and fore bays.

(3) A contour map on a scale of not more than 50 feet to the inch, with a contour interval of not more than 5 feet, showing the proposed location of the power house, other buildings, etc., shall be filed for each power-house site that will be a part of the power project or projects applied for. This map shall also state the pro-

posed type and estimated number and rated capacity of the water wheels and generators to be used.

(4) A map of the survey of the proposed final location of the center line of the transmission line, on a scale of not more than 1,000 feet to the inch, shall be filed for such portion of the transmission lines as are located upon Interior Department lands.

(5) A general map of the entire power project or projects applied for (except transmission lines), on such a scale that the entire survey may be shown upon a single sheet; also a similar map showing the entire primary transmission system.

(K) Copies of field notes in triplicate of the entire final location survey of water conduits and transmission lines and the exterior boundaries of power-house and reservoir sites, bearing an affidavit of the applicant's engineer and a certificate of the applicant in form prescribed by the Secretary. (See Form 7.)

(L) Estimates in quadruplicate for each power project of (1) the total average effective head to be utilized and the per cent thereof to be obtained from dam and from water conduit, respectively; (2) the stream flow and the per cent thereof made available from storage by the project works and by other works, respectively; (3) the area to be flooded by the dam below the flow line fixed by the estimated average effective head; (4) the length of the proposed water conduit (from intake to tailrace outlet); (5) the area and available capacity of each proposed storage reservoir; (6) the available storage capacity of fore bay (or diversion pond); (7) the probable load factor of the power system; and (8) the distance, in miles, of primary transmission.

These estimates should bear an affidavit of the applicant's engineer and a certificate of the applicant (Form 8), and should be accompanied by complete statements in detail of all data on which they are based, including stream measurements, rainfall, stream flow, and evaporation records, drainage areas, total static head and losses in head, probable maximum, minimum, and average power output, load curves of the power system, efficiencies of machinery, probable points of delivery of power, and all other pertinent information.

(M) Such evidence of water appropriation as is specified in regulation 10 (L). If such evidence has been filed with an application for a preliminary permit, only such additional evidence will be required as will cover appropriations or transfers subsequent to the date of the evidence filed with the application for preliminary permit. A certified statement from the proper State agency setting forth the extent and validity of the applicant's water right, if consistent with the State law, must also be filed together with the evidence required

by regulation 5, or a showing of cause why such evidence can not reasonably be presented.

(N) A detailed statement in quadruplicate by the applicant of the time desired for making financial arrangements, for completing preliminary construction, and for beginning "construction of the project works," as defined in regulation 7.

Maps and field notes shall designate by termini and length each water-conduit and transmission line, and by initial point and area each reservoir and power-house site. The termini of water conduits, the termini of transmission lines, and the intersections with boundaries of reservations of the United States and with surveyed township and section lines, and the initial point of survey of power-house sites shall be fixed by reference by course and distance to the nearest existing corner of the public survey; and the initial point of the survey of reservoir sites shall be fixed by reference by course and distance to the nearest existing corner outside of the reservoir by a line or lines not crossing an area that will be covered with water when the reservoir is in use. When any such terminus, intersection, or initial point is upon unsurveyed land, it shall be connected by traverse with an established corner of the public survey, and the distance from the terminus, intersection, or initial point to the corner shall be computed and noted on the map and in the affidavit of the applicant's engineer. When the nearest established corner of the public survey is more than 2 miles distant, this connection may be with a permanent mark on a natural object or a permanent monument which can be readily found and recognized. The field notes shall give an accurate description of the natural object or monument and full data of traverse as required above.

Each separate original map, plan, set of field notes, estimates, and data, evidence of water appropriation, articles of incorporation, and evidence of right to operate within any State shall be plainly marked "Exhibit A," "Exhibit B," etc., respectively, and referred to by such designation in the application. Maps and plans shall in addition be described in the application by their titles as "Exhibit A, map of location of," etc., "Exhibit B, plan of," etc. Duplicate and triplicate copies, etc., should be marked "Exhibit A, duplicate," "Exhibit A," triplicate," etc. Maps should be rolled for mailing, and should not be folded.

An application for final permit shall not be complete until every map or paper required by this regulation has been filed in the form prescribed.

REG. 12. No applications will be received for preliminary permits for the occupancy and use of Interior Department lands for power projects of 100 horsepower total capacity or less. Applications for final permits for such occupancy and use shall be in writing, dated

and signed by the applicant, and, in addition to the items specified in regulation 9, shall be accompanied by:

(J) A map in quadruplicate showing the location of dams, reservoirs, conduits, power houses, and transmission lines or other works.

(K) Field notes of the survey in quadruplicate.

(L) A statement in quadruplicate of the amount of water to be diverted for use, the maximum capacity of the diversion works, and the total average static and effective heads to be utilized.

(M) Such showing as is specified in regulation 11 (M).

The map shall consist of duplicate originals on tracing linen and two print copies, and shall not be larger than 28 by 40 inches or smaller than 24 by 36 inches, and may be on any convenient scale. The map shall show all lines of public-land subdivisions by official survey and the protractions on unsurveyed lands of section and township lines, such protractions in any national forest conforming to the diagram accompanying the proclamation establishing the boundaries of such national forest; and the status as to ownership of all lands in the power project, designating separately lands patented, lands of the United States entered or otherwise embraced in any unperfected claim under the public-land laws, unreserved lands of the United States, and, separately for each reservation, lands included in national forests and other reservations of the United States. The map shall also show: For each reservoir site, the distance and bearing of the initial point of survey from the nearest existing corner of the public survey, the location of the maximum-flow line, and the area and available storage capacity of the reservoir; for each water-conduit line, the distance and bearing of each terminus from the nearest corner of the public survey, the location of the center line of the conduit, and its length; and for each power-house site, the distance and bearing of the initial point of survey from the nearest corner of the public survey, the location of the exterior boundaries of the site, and the area. If on unsurveyed land, the distances and bearings may, if the nearest existing corner of the public survey is more than 2 miles distant, be taken from a permanent mark on some natural object or permanent monument that can be readily found and recognized.

REG. 13. Before a final power permit will be issued for a power project of 100 horsepower total capacity or less, the permittee shall execute or file an agreement which, upon its approval in writing by the Secretary, shall constitute and express the conditions of the permit. Such agreement shall expressly bind the applicant to such of the items enumerated in regulation 14 and such other conditions as may be required by the Secretary.

REG. 14. Before a final power permit will be issued for a power project of more than 100 horsepower total capacity, the permittee shall execute and file an agreement which, upon its approval in writ-

ing by the Secretary, shall constitute and express the conditions of the permit. Such agreement shall expressly bind the applicant—

(A) To construct the project works on the location shown upon and in accordance with the maps and plans submitted with the final application for permit, and to make no material deviation from said location unless and until maps and plans showing such deviation shall have been submitted and approved. (See regulation 15.)

(B) To begin the construction of the project works, or the several parts thereof, within a specified period or periods from the date of execution of the permit, and thereafter to diligently and continuously prosecute such construction unless temporarily interrupted by climatic conditions or by some special or peculiar cause beyond the control of the permittee.

(C) To complete the construction and begin the operation of the project works, or the several parts thereof, within a specified period or periods from the date of execution of the permit.

(D) To operate the project works continuously for the development, transmission, and use of power, unless upon a full and satisfactory showing that such operation is prevented by unavoidable accidents or contingencies this requirement is temporarily waived by the written consent of the Secretary.

(E) To pay annually, in advance, such amounts as may be fixed and required by the Secretary under these regulations. (Regulation 8.)

(F) On demand of the Secretary to install at such places and maintain in good operating condition in such manner as shall be approved by the Secretary accurate meters, measuring weirs, gauges, or other devices approved by the Secretary and adequate for the determination of the amount of electric energy generated by the project works and of the flow of the stream or streams from which the water is to be diverted for the operation of the project works and of the amount of water used in the operation of the project works and of the amounts of water held in and drawn from storage; to keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Secretary; and to make a return during January of each year, under oath, of such of the records of measurements for the year ended on December 31, preceding, made by or in the possession of the permittee, as may be required by the Secretary.

(G) That the books and records of the permittee shall be open at all times to the inspection and examination of the Secretary, or other officer or agent of the United States duly authorized to make such inspection and examination.

(H) On demand of the Secretary to install a system of accounting for the entire power business in such form as the Secretary may prescribe, which system as far as is practicable will be uniform for all

permittees, and to render annually such reports of the power business as the Secretary may direct: *Provided, however,* That if the laws of the State in which the power business or any part thereof is transacted require periodical reports from public utility corporations under a uniform system of accounting, copies of such reports so made will be accepted as fulfilling the requirements of this clause.

(I) To protect all Government and other telephone, telegraph, and power transmission lines at crossings of and at all places of proximity to the permittee's transmission line in a workmanlike manner according to the usual standards of safety for construction, operation, and maintenance in such cases, and to maintain transmission lines in such manner as not to menace life or property.

(J) To clear and keep clear the Interior Department lands along the transmission line for such width and in such manner as the officer of the United States having supervision of such lands may direct.

(K) To dispose of all brush, refuse, or unused timber on Interior Department lands resulting from the construction and maintenance of the project works to the satisfaction of the officer last aforesaid.

(L) To build and repair such roads and trails as may be destroyed or injured by construction work or flooding under the permit, and to build and maintain necessary and suitable crossings for all roads and trails that intersect the water conduit constructed, maintained, or operated under the permit.

(M) To do everything reasonably within the power of the permittee both independently and on request of the Secretary or other duly authorized officer or agent of the United States to prevent and suppress fires on or near the lands to be occupied under the permit.

(N) To pay the full value as fixed by the Secretary for all timber cut, injured, or destroyed on Interior Department lands in the construction, maintenance, and operation of the project works.

(O) To pay the United States full value for all damage to the lands or other property of the United States resulting from the breaking of or the overflowing, leaking, or seeping of water from the project works, and for all other damage to the lands or other property of the United States caused by the neglect of the permittee or of the employees, contractors, or employees of the contractors of the permittee.

(P) To indemnify the United States against any liability for damages to life or property arising from the occupancy or use of Interior Department lands by the permittee.

(Q) To sell power to the United States, when requested, at as low a price as is given to any other purchaser for a like use at the same time, and under similar conditions, if the permittee can furnish the same to the United States without diminishing the quantity of power sold before such request to any other customer by a binding con-

tract of sale: *Provided*, That nothing in this clause shall be construed to require the permittee to increase permanent works or install additional generating machinery.

(R) To abide by such reasonable regulation of the service rendered and to be rendered by the permittee to consumers of power furnished or transmitted by the permittee, and of the prices to be paid therefor as may from time to time be prescribed by the State or any designated agency of the State in which the service is rendered: *Provided*, That for the purposes of this paragraph any such regulation shall be deemed to be suspended pending proceedings in the courts of such State, or in the Supreme Court of the United States on appeal from said State courts where such proceedings are in the nature of an appeal taken direct from the officer, commission, or board prescribing such regulation to said State courts.

(S) Upon demand in writing by the Secretary to surrender the permit to the United States or to transfer the same to such State or municipal corporation as he may designate, and to give, grant, bargain, sell, and transfer with the permit all works, equipment, structures, and property then owned or held by the permittee on lands of the United States occupied or used under the permit, and then valuable or serviceable in the generation, transmission, and distribution of power: *Provided*, (1) That such surrender or transfer shall be demanded only in case the United States or the transferee shall have first acquired such other works, equipment, structures, property and rights of the permittee as are dependent in whole or in essential part for their usefulness upon the continuance of the permit; (2) that such surrender or transfer shall be on condition precedent that the United States shall pay or the transferee shall first pay to the permittee the reasonable value of all such works, equipment, structures, and property to be surrendered or transferred; (3) that such reasonable value shall not include any sum for any permit, right, franchise, or property granted by any public authority in excess of the sum paid to such public authority as a purchase price therefor; and (4) that such reasonable value shall be determined by mutual agreement of the parties in interest, and in case they can not agree, by the Secretary under a rule, which, except as modified by the requirements of this paragraph, shall be the then existing rule of valuation for power properties in condemnation proceedings in the State in which the properties to be surrendered or transferred are located. But nothing herein shall prevent the United States or any State or municipal corporation from acquiring by any other lawful means the permit or the works, equipment, structures, or property then owned or held by the permittee on lands of the United States occupied or used under the permit.

(T) That in respect to the regulation by any competent public authority of the service to be rendered by the permittee or the price

to be charged therefor, and in respect to any purchase or taking over of the properties or business of the permittee or any part thereof by the United States, or by any State within which the works are situated or business carried on in whole or in part, or by any municipal corporation in such State, no value whatsoever shall at any time be assigned to or claimed for the permit or for the occupancy or use of Interior Department lands thereunder, nor shall such permit or such occupancy and use ever be estimated or considered as property upon which the permittee shall be entitled to earn or receive any return, income, price, or compensation whatsoever.

(U) That the works to be constructed, maintained, and operated under the permit will not be owned, leased, trusteeed, possessed, or controlled by any device or in any manner so that they form part of or in any way effect any combination in the form of an unlawful trust, or form the subject of any unlawful contract or conspiracy to limit the output of electric energy, or in restraint of trade with foreign nations or between two or more States, or within any one State in the generation, sale, or distribution of electric energy.

(V) That any approval of any alteration or amendment, or of any map or plan, or of any extension of time shall affect only the portions specifically covered by such approval; and that no approval of any such alteration, amendment, or extension shall operate to alter or amend, or in any way whatsoever be a waiver of any other part, condition, or provision of the permit.

(W) To perform such other specified conditions with respect to the occupancy and use of lands within any of said parks or any military, Indian, or other reservation as may be found by the chief officer of the department under whose supervision such park or reservation falls to be necessary as conditions precedent to the issuance of the permit in order to render the same compatible with the public interest.

REG. 15. During the progress of construction amendments to maps of location or plans of structures will be required from the permittee if there is a material deviation from the maps or plans as originally filed, but no amendment will be allowed that is incompatible with the occupancy and use of lands under existing permits or pending applications. Any approval of an amendment of a map or plan or of any extension of time shall be in the form of a supplemental agreement and permit so drawn as to become a part of the original agreement and permit and a substitute for the clauses amended. Any approval of any amendment of any map or plan shall apply only to the portions specifically covered by such approval, and no approval of any such amendment shall operate to amend or be in any way a waiver of any other part, condition, or provision of the permit.

If, after the completion of the project works, there are any deviations in location from those shown upon the original map or approved amendments thereof, additional maps prepared in the manner prescribed for original maps of location will be required to be filed within six months after the completion of the project works, showing the extent of such deviations and the final locations of such project works. Also upon the completion of the project works detailed working plans will be required of the works as constructed, except such parts as have been constructed in compliance with plans originally filed or approved amendments thereof. Such new or additional plans may be originals on tracing linen or Van Dyke negatives of the permittee's own working plans. The plans of conduits, dams, and appurtenant structures must be complete; of power houses, only general layout plans are required.

REG. 16. An extension of the periods stipulated in the permit for beginning or completing construction and for beginning operation will be granted only by the written approval of the Secretary after a showing by the permittee satisfactory to the Secretary that the beginning or completion of construction and beginning of operation has been prevented by engineering difficulties that could not reasonably have been foreseen, or by other special and peculiar causes beyond the control of the permittee.

REG. 17. A final permit may be transferred to a new permittee only (1) by a court of competent jurisdiction under a decree of foreclosure to enforce a mortgage or deed of trust that shall have been given in good faith to secure capital for the power business as defined in regulation 7, embracing the works constructed or to be constructed under such permit, and without any intent to evade the restrictions upon transfers in this regulation hereafter set forth; or (2) under the following conditions: The proposed transferee shall file with the Commissioner of the General Land Office, Washington, D. C., the decree, execution of judgment, will, proposed contract of sale, or other written instrument upon which the proposed transfer is based, or a properly certified copy thereof, also an application by the proposed transferee in the form of an agreement binding the proposed transferee to the performance of such new and additional conditions expressed therein as the Secretary may deem necessary; and thereupon the Secretary may, in his discretion, approve in writing the proposed transfer, and after such approval the transferee shall succeed to all the rights and obligations of the permittee, subject, however, to such new and additional conditions as shall have been embodied in such agreement and so approved.

REG. 18. If any person shall make a false engineer's affidavit under these regulations, the secretary may order that no map, field notes, plan, or estimate made by such person shall be received or filed while

the order is in force. If any person or corporation, for himself or itself, or as the attorney, agent, or employee of another, shall offer or file any map, field notes, plan, or estimate bearing a false engineer's affidavit, knowing the same to be false, the secretary may order that no application for a power permit shall be filed by or received from the person or corporation so offending, either in his or its own behalf or as attorney, agent, or employee of another, and that no power permit shall be issued to such person or corporation while the order is in force.

REG. 19. Violation by a final permittee of any of the provisions of these regulations, or of any of the conditions of a permit issued to him thereunder, shall be sufficient ground for revocation of such permit; but attention is called to the statute under which these regulations are issued, which provides:

That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or by his successor in his discretion.

No permit will be deemed to be revoked except on the issuance by the Secretary of a specific order of revocation. Change of jurisdiction over lands from one executive department to another will not revoke but will change the administrative jurisdiction over a permit for the occupancy and use of such lands. The final disposal by the United States of any tract traversed by a right of way permitted under this act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act.

REG. 20. Any power project under permit, or any part thereof, whether constructed or unconstructed, may be abandoned by the permittee upon the written approval of the Secretary after a finding by the Secretary that such abandonment will not tend to prevent the subsequent development of such project or part thereof so abandoned, and after the fulfillment by the permittee of all the obligations under the permit, in respect to payment or otherwise, existing at the time of such approval. Upon such abandonment, after such approval thereof and fulfillment of existing obligations, so much of the agreement and permit as relates to the abandoned project or part of a project will be formally revoked by the Secretary.

REG. 21. When an original application for a preliminary or final permit for the use of Interior Department lands only is submitted to a local land office, notations will be made on the tract records of that office as to the fact of such application with respect to each tract affected, giving the serial number, the date of filing, the name of the applicant, and the character of the application or the act under

which it is made. In addition to the regular filing stamp imprint on the accompanying papers the register will note on the original map, over his original signature, the serial number, date of filing, and a certificate that lands of the United States are affected indicating the mark or markings by which they are identified on the map. All the application papers will then be transmitted promptly to the General Land Office with report that the required notations have been made on the records of the local land office. When the application affects lands in more than one district, the register of the local land office to which is submitted only a print copy of the map, will make notations and transmit the print copy to the General Land Office in like manner.

If no land of the United States in a district is involved in the application, the officers of the local land office in that district will reject it, allowing the usual right of appeal.

During the pendency of an application for a permit, the local land officers will accept no filing with respect to any of the lands affected thereby except other applications for permits as provided in these regulations; but no valid right will be initiated by an applicant unless a permit is issued to him and said right shall then date from the completion of the application papers.

Upon receipt of the application papers at the General Land Office they will be registered and the pendency of the application will be noted on the tract records of that office in the manner hereinbefore specified for the local land offices. The General Land Office will examine the application and determine whether it is complete with respect to the requirements of that office; and will call upon the applicant through the local land office to supply any deficiency. Thereupon that office will promptly transmit the entire record to the Director of the Geological Survey, stating the fact of such completion and the date thereof as determined by the receipt at the local land office of the last paper required to be filed.

Upon receipt of the application for permit at the Geological Survey, that office will promptly call upon other offices for such reports and recommendations, in triplicate, with respect to the status of the lands, interference with matters under the jurisdiction of such offices, and conditions precedent to the issuance of the permit, as the nature of the case may require; and will determine whether the application papers are complete with reference to the requirements of the Geological Survey, and will call upon the applicant directly to supply any deficiency. When the application is found by the Geological Survey to be thus complete, the fact of such completion and the date thereof as determined by the receipt at the Geological Survey of the last paper required (or in case the application is thus complete when received by the Geological Survey, the date as specified by the Gen-

eral Land Office) will be noted on the records of the Geological Survey; and said date will be taken as the date of initiation of priority as defined in regulation 3 and as the date of initiation of valid rights of the applicant as against other claimants, and will be so specified in the permit, if issued.

When an application for the use of national forest and Interior Department lands is submitted, the same procedure will be followed as in other cases, except that no draft of permit will be prepared until the Geological Survey receives notice from the Department of Agriculture of the fact and date of the completion of the application in that department. The date so notified will be taken as the date of initiation of priority as defined in regulation 3, but the initiation of valid rights of the applicant as against other claimants on Interior Department lands will date from the completion of the application in the Interior Department, and the respective dates will be so specified in the permit, if issued. In case the application papers are found to be incomplete by the General Land Office or the Geological Survey, the office so finding will mail to the Department of Agriculture a copy of the letter calling upon the applicant to supply the deficiency; and the draft of the permit will be prepared by the Geological Survey only after consultation with the Department of Agriculture.

The recommendation of the Geological Survey, together with the two tracings of all maps of location, two sets of field notes, and two sets of the formal application papers required by regulation 9, shall be transmitted to the General Land Office, and that office will thereupon submit the case to the Secretary for action, presenting therewith its recommendation and that of the Geological Survey. In case the Geological Survey recommends that a permit be issued to the applicant that office will submit with its recommendation to the General Land Office a draft of such permit, in duplicate, together with two copies thereof and a draft of a letter to the applicant transmitting the permit to him for execution. After execution by the applicant and approval by the Secretary, the General Land Office will note the fact of such approval on the maps of location, will transmit one original of the permit to the permittee and one copy thereof to the Geological Survey, and will transmit one tracing of all maps of location, one set of field notes, and one copy of the permit to the local land office for filing, and will retain one original of the permit, one tracing of all maps of location, and one set of field notes in the files of the General Land Office. The approval of the permit and the dates of initiation of priority and of valid rights of the permittee will thereupon be noted on the tract records of the general and local land offices.

Matters of relative priority of applications under these regulations, incompatibility of works, relative beneficial utilization of resources, and the like, including all protests against the approval of applica-

tions on these grounds, shall be considered by the Geological Survey and covered by its recommendations.

After the issuance of the permit, the Geological Survey will make such investigations and report to the Secretary as may be necessary for the determination and revision of rates and capacities, the supervision of construction and operation and of the records of the permittee as contemplated by these regulations, and, in general, for all engineering matters pertaining to the power development and the power resources involved. The compensation for the first year shall be transmitted by the applicant to the Secretary with the executed agreement prior to the issuance of the permit, in the form of a certified check to the order of the Secretary of the Interior, who, upon the issuance of the permit, will indorse the same to the order of the receiving clerk of the General Land Office for deposit to the credit of the Treasurer of the United States as "Sales of public lands."

Under the authority given by the said act of February 15, 1901 (c. 372, 31 Stat., 790), the foregoing regulations are, on this 1st day of March, 1913, hereby made and fixed with respect to applications and permits for rights of way under the said act for the development, transmission, and use of power through the public lands and reservations of the United States (except national forests) and the Yosemite, Sequoia, and General Grant National Parks, superseding the regulations approved August 24, 1912 [41 L. D., 150].

WALTER L. FISHER,
Secretary of the Interior.

FORMS.

The following forms are prescribed for applications for permits under the act of February 15, 1901 (31 Stat., 790), in accordance with the foregoing regulations:

FORM 1. OFFICIAL STATEMENT OF ORGANIZATION.

[See regulation 9 (E).]

I ———, secretary (or president) of the ——— Company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with the construction of works as indicated in the application of which this statement is a part, according to the existing laws of the State of ———, and that the copy of the articles of association (or incorporation) of the company filed with said application is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company this — day of —, in the year 19—.

—————,
————— of the ——— Company.

FORM 2. TRUE LIST OF OFFICERS.

[See regulation 9 (F).]

I, ———, do certify that I am the president of the ——— Company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (Here insert the full name and official designation of each officer.)

In witness whereof I have hereunto set my name and the corporate seal of the company this — day of —, in the year 19—.

President of the — Company.

[SEAL OF CORPORATION.]

FORM 3. APPLICATION FOR PRELIMINARY POWER PERMIT.

[See regulation 10 (I).]

The ———, a corporation organized and existing under and by virtue of the laws of the State of ——— (———, a citizen of the United States and resident of the State of ———), with office and principal place of business at ———, in the State of ———, hereby makes application for a preliminary power permit for the occupancy and use for a period of ——— months of certain lands of the United States in the State of ———, as such lands are approximately shown on a certain map executed by the undersigned applicant on the — day of ———, 19—, which map is filed herewith and made a part hereof. The permit for which this application is made is desired in order that the applicant may secure the data required for an application for final permit for power purposes in accordance with the regulations governing applications under the act of February 15, 1901 (31 Stat., 790).

Map and papers required for this application are being submitted as follows:

1. As required by the regulations of the Department of the Interior.

(a) Complete application to the local land office at ———.

(b) Print copy of maps to the local land office at ———.

2. As required by the regulations of the Department of Agriculture; complete application to the district forester at ———.

In witness whereof, — has caused this instrument to be executed this — day of ———, 19—.

[SEAL OF CORPORATION.]

By _____

Attest:

_____, Secretary.

FORM 4. DATING AND SIGNATURE OF APPLICANT.

[See regulation 10 (J), (K), (L).]

This map (these estimates, this copy of notice, etc.) is a part of the application for preliminary power permit made by the undersigned this — day of ———, 19—.

By _____

Attest:

_____, Secretary.

FORM 5. APPLICATION FOR FINAL POWER PERMIT FOR PROJECT OF MORE THAN 100 HORSEPOWER.

[See regulation 11 (I).]

The ———, a corporation organized and existing under and by virtue of the laws of the State of ——— (———, a citizen of the United States and resident of the State of ———,) with office and principal place of business at ———, in the State of ———, hereby makes application for a final power permit for the occupancy and use of certain lands of the United States in the State of ———, by constructing, maintaining, and operating thereon for the main purpose of the development, transmission, and use of power (here add any other proposed purpose) the following works:

(Omit such of the four following items (a), (b), (c), (d) as may not be applicable.)

(a) ——— dams approximately ——— (masonry, earth, etc., diverting or storage) feet in maximum height and approximately ——— feet in maximum length, to occupy approximately ——— acres, respectively, and to form ——— reservoirs to flood approximately ——— acres at extreme flood level, ——— acres at the flow line fixed by the average effective head, and approximately ——— acres at spillway level, respectively;¹ in section ———, township ———, range ———, ——— meridian, said dams and said reservoirs being designated, respectively, as follows: ———.

(b) ——— conduits approximately ——— miles in length, respectively,¹ crossing sections ———, township ———, range ———, ——— meridian, said conduits being designated, respectively, as follows: ———.

(c) ——— power houses and appurtenant structures to occupy approximately ——— acres, respectively,¹ in section ———, township ———, range ———, ——— meridian; said power houses being designated, respectively, as follows: ———.

(d) ——— transmission lines ——— miles in length, respectively,¹ crossing sections ———, township ———, range ———, ——— meridian; said transmission lines being designated as follows: ———. All as approximately shown upon certain maps and plans which, together with certain papers are, filed herewith and made a part hereof; said maps, plans, and papers being designated as follows:²

Exhibit A. Copy of articles of incorporation. (See Reg. 9 (A).)

Exhibit B. Copy of State law under which the company was organized. (See Reg. 9 (B).)

Exhibit C. Certificate of filing of articles. (See Reg. 9 (B).)

Exhibit D. Certificate of compliance with laws. (See Reg. 9 (D).)

Exhibit E. Official statement of organization. (See Reg. 9 (E) and Form 1.)

Exhibit F. True list of officers. (See Reg. 9 (F) and Form 2.)

Exhibit G. Copy of State law governing water rights. (See Reg. 9 (G).)

Exhibit H. Certificate of no change in laws. (See Reg. 9 (H).)

Exhibit I. Formal application. (See Reg. 11 (I) and Form 5.)

¹ If land is unsurveyed substitute for the description by legal subdivisions in paragraphs (a), (b), (c), and (d), the following: "Located on certain lands described and shown by the map and field notes accompanying the application."

² The entire series of exhibits shown above should be listed in the application with the foregoing designations, but such of the exhibits as are not applicable or are not required by the regulations may be omitted and the indorsement "Not applicable" or "Not required" be made at the proper place in the list.

Exhibit J. Maps of location and plans of structures as follows:

(Here list separately as Exhibit J (1), Exhibit J (2), etc., with appropriate title, each map and plan submitted in compliance with Reg. 11 (J).)

Exhibit K. Field notes of survey (See Reg. 11 (K)).

Exhibit L. Estimates and data (See Reg. 11 (L)).

Exhibit M. Evidence of water appropriation (See Reg. 11 (M)).

Exhibit N. Statement of time desired (See Reg. 11 (N)).

This application has been prepared to be filed in accordance with the regulations of the Secretary of the Interior, in order that the undersigned applicant may obtain the benefits of the act of Congress approved February 15, 1901 (31 Stat., 790), entitled "An act relating to rights of way through certain parks, reservations, and other public lands."

Maps and papers required for this application are being submitted as follows:

1. As required by the regulations of the Department of the Interior.

(a) Complete application to the local land office at _____, _____.

(b) Print copy of maps to the local land office at _____, _____.

2. As required by the regulations of the Department of Agriculture: Complete application to the district forester at _____, _____.

In witness whereof _____ has caused this instrument to be executed this _____ day of _____, 19____.

[SEAL OF CORPORATION.]

Attest:

_____, *Secretary*.

By _____,

_____.

FORM 6. AFFIDAVIT OF APPLICANT'S ENGINEER AND CERTIFICATE OF APPLICANT ON MAPS AND PLANS.

[See Regulation 11 (J).]

STATE OF _____, County of _____, ss:

_____, being duly sworn, says he is by occupation a _____ engineer, employed by the _____ company, and that this map (plan) (a) was prepared under his supervision from actual surveys and designs; (b) is in complete agreement with the surveys from which the accompanying field notes, marked "Exhibit K," were made; (c) correctly represents so far as shown thereon, the location and design of the works described in the accompanying application form, marked "Exhibit I"; (d) to the best of his knowledge and belief correctly represents all other matters shown hereon; and (e) represents a safe, adequate, and feasible plan for the fullest economic utilization of the power resources involved.

_____, *Engineer*.

Subscribed and sworn to before me this _____ day of _____, 19____.

[SEAL.]

_____, *Notary Public*.

This is to certify that _____, who subscribed the affidavit hereon is the person employed by the undersigned applicant to prepare this map (plan), which map (plan) has been adopted by the applicant as the approximate final location (design) of the works thereby shown; and that this map (plan) is filed as Exhibit J of the complete application whose several parts are described in the accompanying application form marked "Exhibit I."

[SEAL OF COMPANY.]

Attest:

_____, *Secretary*.

By _____,

_____.

FORM 8. AFFIDAVIT OF APPLICANT'S ENGINEER AND CERTIFICATE OF APPLICANT ON
FIELD NOTES OF SURVEYS.

[See Regulation 11 (K).]

STATE OF ———, *County of* ———, *ss:*

———, being duly sworn, says he is by occupation a ——— engineer employed by the ——— company; that the foregoing notes of survey are a true and complete copy of the field notes of an actual location survey made under his direction as an employee of said company; that all of said notes and no others were used to locate on the maps filed together herewith and marked "Exhibit J" the works described on the application form filed herewith and marked "Exhibit I."

———, *Engineer.*

Subscribed and sworn to before me this — day of ———, 19—.

[SEAL.]

———, *Notary Public.*

This is to certify that ——— who subscribed the affidavit hereon is the person employed by the undersigned applicant to make the survey represented by these field notes, which survey was authorized by the applicant; and that these field notes are filed as Exhibit K of the complete application whose several parts are described in the accompanying application form marked "Exhibit I."

[SEAL OF THE COMPANY.]

Attest:

By

———, *Secretary.*

FORM 8. AFFIDAVIT OF APPLICANT'S ENGINEER AND CERTIFICATE OF APPLICATION ON
ESTIMATES AND DATA.

[See Regulation 11 (L).]

STATE OF ———, *County of* ———, *ss:*

———, being duly sworn, says he is by occupation a ——— engineer employed by the ——— company; that the accompanying estimates and data were prepared under his supervision; that the data are all the data available for the estimates; and that both data and estimates are correct to the best of his knowledge, judgment, and belief and provide a safe and satisfactory basis for the power project described in the accompanying application form marked "Exhibit I."

———, *Engineer.*

Subscribed and sworn to before me this — day of ———, 19—.

[SEAL.]

———, *Notary Public.*

This is to certify that ———, who subscribed the affidavit hereon, is the person employed by the undersigned applicant to prepare the accompanying estimates and data; that the estimates and data have been approved by the applicant and are filed as Exhibit L of the complete application, whose several parts are described in the accompanying application form marked "Exhibit I."

[SEAL OF COMPANY.]

Attest:

By

———, *Secretary.*

Approved January —, 1913.

———, *Secretary.*

**RIGHT OF WAY—LAKE ELEANOR AND HETCH HETCHY VALLEY
RESERVOIR SITES.**

CITY OF SAN FRANCISCO.

DEPARTMENT OF THE INTERIOR,

*March 1, 1913.**The Mayor and Board of Supervisors of the City and County of San Francisco, California.*

GENTLEMEN: In the matter of the permit issued on May 11, 1908, by the Hon. James R. Garfield, Secretary of the Interior, to the city of San Francisco, for certain reservoir and other rights of way within the Yosemite National Park, upon what are known as the Lake Eleanor and Hetch Hetchy Valley reservoir sites, there are two distinct proceedings pending before the Department of the Interior. One is the rule issued on February 25, 1910, by the Hon. R. A. Ballinger, Secretary of the Interior, to the mayor and supervisors of the city and county of San Francisco, to show why the Hetch Hetchy Valley reservoir site should not be eliminated from said permit. The other is the application of the city and county of San Francisco for a modification of the said permit, so as to allow the immediate use of the Hetch Hetchy Valley for reservoir purposes.

The Yosemite National Park was originally created as a forest reservation (not as a national park) by the act of Congress of October 1, 1890 (26 Stat., 650), which provided:

said reservation shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities, or wonders within said reservation, and their retention in their natural condition.

In view of the fact that the provisions of law and the rules and regulations adopted by the Secretary were, in substance, the same as those provided for the Sequoia National Park, and because the reservation surrounded the tract of land known as Yosemite Valley, which had been granted to the State of California for a public park by act of Congress approved June 30, 1864, Secretary John W. Noble, in his annual report for 1890, called the reservation the "Yosemite National Park," and in subsequent acts of Congress this title appears to have been used without being specifically adopted. In 1905 the State of California ceded the Yosemite Valley to the United States upon the condition that it should be held and maintained as a national park, and on June 11, 1906, this recession was accepted by joint resolution of Congress, which specifically referred to the act of October 1, 1890, and established certain boundaries between the "Sierra Forest Reserve" and the "Yosemite National Park."

Within the exterior boundaries of the park there was a considerable number of tracts of land the title to which had passed from the Government to private parties. These private lands included a large part of the shores of Lake Eleanor and the greater portion of the floor of the Hetch Hetchy Valley, as well as other tracts of considerable area located in other portions of the park. The Department of the Interior and many citizens and groups or associations of citizens have repeatedly urged upon Congress that these private holdings should be purchased by the Government, but Congress has refused to appropriate money for this purpose. The private lands at Lake Eleanor and Hetch Hetchy have been purchased by the city of San Francisco, which has also acquired other valuable lands and rights within the exterior boundaries of the park. Its holdings, however, do not include the dam site. On February 15, 1901, Congress passed an act (31 Stat., 790) entitled "An act relating to rights of way through certain parks, reservations, and other public lands." That act reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of the said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion; and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

This is the so-called "revocable permit" act, under which rights of way for electrical plants, transmission lines, canals, ditches, and

reservoirs are permitted through the public lands and forest reservations of the United States. The only national parks to which it applies are the Yosemite, Sequoia, and General Grant National Parks, in the State of California. The act was passed on February 15, 1901. On October 15, 1901, the city of San Francisco, through the Hon. James D. Phelan, then mayor, filed an application for reservoir rights of way at Lake Eleanor and Hetch Hetchy. After consideration of this application, Hon. E. A. Hitchcock, then Secretary of the Interior, on December 22, 1903, refused the permit on the principal ground that he did not have the necessary statutory authority. He discussed the existing and available water supplies of the city of San Francisco, and upon the information then before him, held that there were other adequate sources of supply available; but the controlling consideration for his refusal of the permit was the construction placed by him upon the two acts of Congress above mentioned.

The city continued its efforts to obtain the permit, but on February 5, 1905, Secretary Hitchcock again reached the conclusion that the permit "could not be granted without further legislation by Congress." The application was again renewed by the city before Secretary Hitchcock's successor, Hon. James R. Garfield, and on May 11, 1908 [36 L. D., 409], Secretary Garfield granted the permit which is now in force. This permit provided that the city might develop the Lake Eleanor reservoir site and that if this site when developed to its full capacity should not prove adequate for the needs of the city the Hetch Hetchy Valley could then be used as a reservoir. The permit is set out in full in the report of the Advisory Board of Army Engineers made on February 19, 1913, and contains other important provisions, which need not be referred to at this time.

In October, 1909, Hon. R. A. Ballinger, then Secretary of the Interior, instructed the Director of the Geological Survey and certain engineers of the Reclamation Service to investigate and report upon the sources of water supply involved in the permit and upon the necessity for the retention of the Hetch Hetchy Valley within the terms thereof. On February 25, 1910, in view of the report made of the results of this investigation, especially "as to the sufficiency of the Lake Eleanor reservoir site when fully developed, and in view of the importance of the public interests involved in this matter and the Government's obligation in connection therewith," Secretary Ballinger required the city and county of San Francisco "to show why the Hetch Hetchy Valley and reservoir site should not be eliminated from said permit."

At the request of the Secretary of the Interior the War Department, by direction of the President, appointed an Advisory Board of three Army Engineers to assist the Secretary of the Interior in passing upon the matters submitted to the Interior Department under

the order to show cause, and Congress subsequently appropriated \$12,000 to pay the expenses of this Advisory Board. A hearing was held on May 25 and 26, 1910, and upon application of the city a postponement was granted until June 1, 1911, for the purpose of enabling the city to furnish the necessary information for a proper determination of the important questions involved, and the city undertook to furnish this information at its own expense and with due diligence. The Advisory Board of Army Engineers was also authorized to procure such independent data and information as it deemed proper. It has conducted an extensive investigation on its own account and has made personal inspections of many of the proposed sources of water supply and reservoir sites, including visits to the Hetch Hetchy and Lake Eleanor. The order of continuance is set out in full in the report of the Advisory Board.

This was the situation when I became Secretary of the Interior in March, 1911. Shortly thereafter the city applied for a continuance, which was granted until December 1, 1911. Upon a further application of the city the time was extended until March 1, 1912, and again until June 10, 1912. These later applications were all granted by me with the greatest reluctance and only after pointing out to the representatives of the city the importance of an early hearing, so that the many difficult and intricate questions could be thoroughly considered and ample time might be available for procuring such additional information and permitting such additional discussion as would in all probability be found essential as a result of the formal hearing. Nevertheless, on May 28, 1912, the city again presented a request for a further extension of time in which to secure and present its evidence. It was demonstrated that the city would not be able to present its case without a substantial extension of time, and I appreciate quite fully the adverse conditions with which the present representatives of the city have had to contend and many of which were practically unavoidable. A detailed schedule was prepared fixing various dates on or before which the city would be able to make documentary showing upon the different matters under investigation, and it was required to make this showing in accordance with this schedule. Appropriate periods were fixed within which the objectors should have an opportunity to examine the matters presented by the city and to answer them and a further period within which the city was to reply. The formal hearing was set for November 20, 1912, and later postponed until November 25, 1912. In September, 1911, I personally visited Lake Eleanor and Hetch Hetchy.

The oral hearing before me began on November 25, 1912, and continued until and including November 30. The reports and other documents filed on and prior to this hearing included thousands of printed or typewritten pages with financial and statistical tables,

diagrams, and maps. They are enumerated in the report of the Advisory Board of Army Engineers. Nevertheless, as had been apparent, the information was incomplete in important particulars and it was found necessary or desirable to call for additional reports and statements. Dates were fixed within which these matters were to be supplied, but it was not until the middle of January, 1913, that the city completed its showing, including a draft of the permit which it requested the department to issue as a modification of the permit issued by Secretary Garfield. The modifications proposed were of great importance and included a particular treatment of the interests of the Turlock-Modesto irrigation district, which had not previously been discussed. On February 1, 1913, the city authorities requested that this new provision be further modified. To these modifications the representatives of the Turlock-Modesto district have objected and presented a substitute. The answer of the city to the proposed substitute was not received until February 15. Meanwhile, however, the Advisory Board of Army Engineers was giving to the various engineering questions submitted to it such consideration as was practicable in the uncompleted state of the record. The board was not able to make its report to me until February 19, 1913. Since that date the pressure of official business inevitable during the closing weeks of an administration has prevented me from giving to this report and to the entire matter to which it relates that time and consideration which the nature and importance of the questions at issue demand.

If it were clear that I should issue to the city of San Francisco a permit of the general character it requests, it would have been and would now be absolutely impossible within the time available to embody the details of such a permit in a properly considered document. This is a matter of the greatest regret to me as I had hoped to be able at least to draft a permit embodying the provisions which, in my judgment, should be contained in any permit for the use of the Hetch Hetchy Valley as a reservoir site by the city of San Francisco and the communities around San Francisco Bay. The importance of doing this, however, is much reduced by the fact that I have reached the conclusion that a permit for this purpose should not be issued by the Secretary of the Interior under the existing law. This conclusion is not based at all upon questions of detail connected with the permit, but is based upon the fact that the only statutory authority under which such a permit could be issued is the act of February 15, 1901.

The first and main conclusion reached by the Advisory Board of Army Engineers is as follows:

The board is of the opinion that there are several sources of water supply that could be obtained and used by the city of San Francisco and adjacent com-

munities to supplement the near-by supplies as the necessity develops. From any one of these sources the water is sufficient in quantity and is, or can be made, suitable in quality, while the engineering difficulties are not insurmountable. The determining factor is principally one of cost; in some cases, however, such as the Sacramento, sentiment must be taken into consideration.

The project proposed by the city of San Francisco, known as the Hetch Hetchy project, is about \$20,000,000 cheaper than any other feasible project for furnishing an adequate supply. The only exception is the filtered Sacramento project, which in actual cost is about \$30,000,000 greater than the Hetch Hetchy project, but by discounting to 1914 becomes only \$13,000,000 greater.

The Hetch Hetchy project has the additional advantage of permitting the development of a greater amount of water power than any other.

I do not believe that the Secretary of the Interior should grant, under the act of February 15, 1901, a permit in this case based upon the principal determining factor of the difference in cost between available alternative sources of water supply, whether that difference be \$13,000,000 or \$20,000,000, or even more than \$20,000,000. If the Secretary were to do this, he would, in a certain important sense, be placing a monetary value upon the preservation of the Hetch Hetchy Valley in its present natural condition. He would be determining that in order to save the expenditure of a certain sum of money by the people of San Francisco the people of the whole country should consent to change the present natural condition of the Hetch Hetchy Valley. It may well be that such consent would be justified. It depends upon the effect of the use permitted and upon the amount of money saved, as well as upon other considerations. Such action, however, should not be taken by the Secretary without a clearer authorization by Congress than I am able to believe was consciously intended when the act of 1901 was passed. In any event, such action with respect to so important a feature of a national park as is the Hetch Hetchy Valley would constitute a precedent which should be most carefully and effectively guarded before it is established.

This conclusion is not based upon the opinion that the conversion of the Hetch Hetchy Valley into a reservoir or lake would so seriously mar the scenic beauty of the valley as is contended by many of the objectors to the city's application. I have been convinced that the proposed use of the Hetch Hetchy as a reservoir will not require undesirable sanitary restrictions upon the use of its watershed by the public, if the permit contains the provisions recommended by the Advisory Board. If the use of the Hetch Hetchy Valley was clearly necessary for the city of San Francisco and its adjacent communities, I believe that such change in its condition and such loss or impairment of scenic beauty as might possibly occur would be amply justified and would not be a matter of such serious moment as to be at all controlling. It is indeed an open question about which real differences of disinterested and intelligent opinion exist whether the

valley would not be as beautiful if it contained the lake created by the dam as it is with its present natural floor. Nevertheless, the valley should be retained in its natural condition unless ample justification exists for changing it. The act of October 1, 1890, creating the reservation which is now the Yosemite National Park, provides "for the preservation from injury of all . . . natural curiosities or wonders within such reservation and their retention in their natural condition," and this provision should be followed unless there is clearly some adequate justification for a different course.

I am unable to agree with the conclusion reached by Secretary Hitchcock that the act of February 15, 1901, does not confer upon the Secretary of the Interior technical legal authority for permitting the use of the Hetch Hetchy as a reservoir site. The act of 1901 expressly mentions the Yosemite National Park as one of the reservations to which it is applicable, and in express language the Secretary of the Interior is authorized and empowered to permit the use of rights of way therein "for water plants, dams, and reservoirs" for "the supplying of water for domestic, public, or any beneficial uses." I can not find in the act of 1901 any limitation which makes it subject by a process of construction or otherwise to the general provisions of the act of 1890 with respect to the Yosemite National Park. I do find in the act of 1901 the provision that the permits which it authorizes the Secretary of the Interior to grant shall be issued only "upon a finding by him that the same is not incompatible with the public interest"; and in view of the language of the Yosemite reservation act of 1890 I believe that as a matter of broad public policy, and not at all as a matter of necessary statutory construction, the natural condition of so important a natural curiosity or wonder as the Hetch Hetchy Valley should not be radically changed without the express authority of Congress embodied either in a statute granting a permit and fixing its terms and conditions or by an act conferring upon the Secretary of the Interior the power to issue such a permit upon terms and conditions to be fixed by him within broad general limitations. I have repeatedly urged that the act of 1901 should be amended in this very way.

It is clear and it is conceded by the applicants for this permit that it should not be granted except upon terms and conditions which the city of San Francisco can be legally and effectively compelled to observe. The act of February 15, 1901, does not in words authorize the Secretary of the Interior to impose "terms and conditions" upon the permits issued by him, and it is vigorously contended by other applicants under it for permits throughout the public domain that the act is not susceptible of the construction that it does authorize the Secretary to impose terms and conditions in the permits for which they apply. The act provides that the permits shall be issued

"under general regulations" to be fixed by the Secretary of the Interior, and it expressly provides that these permits "may be revoked by him or his successor, in his discretion, and shall not be held to confer any right or easement or interest in, to, or over any public land, reservation, or park." General regulations have been fixed by the Secretary which contain provisions which might be held to impose certain general terms and conditions applicable to all permits or to all permits of a particular class or kind.

I have repeatedly pointed out as vigorously as I am able that this statute as it now reads is unsound in principle and injurious in practice with respect to both the public and the private interest affected. It is most unsatisfactory as a basis for the important administrative actions that can be taken only under it. I have been willing to issue permits under it only because these permits are by the express terms of the statute made revocable in the discretion of the Secretary. Were it not for this power of revocation the validity of some of the general regulations and of some of the conditions imposed in or under them might be contested by the permittees. The existence of the power of revocation makes it possible to ignore this question of statutory construction in the case of permits to individuals or private corporations. The power of revocation, however, is an ineffectual weapon with which to enforce the terms and conditions of a permit issued to a municipal corporation such as the city of San Francisco. If that city and its adjacent communities should invest the money of the tax payer in creating a municipal water supply dependent on a reservoir in the Hetch Hetchy Valley, no Secretary of the Interior would or should revoke the permit in order to enforce terms and conditions which might otherwise not be legally binding upon the city. If these terms and conditions could not be enforced in and of themselves by direct action under the permit, they could not practicably be enforced at all. I believe that certain kinds of "terms and conditions" can properly be provided by or under "general regulations" as this expression is used in the existing statutes. I have been unable, however, to see how the special "terms and conditions" which clearly should be attached to any permit to use the Hetch Hetchy could be included within any "general regulations" which could be fixed by the Secretary under the language of the act of 1901. These terms and conditions are in their very nature special and peculiar to this particular permit, as a reading of the report of the Advisory Board will clearly show.

The foregoing considerations seem to me controlling upon the pending application of the city. I therefore continue both this application and the rule to show cause until application can be made by the city to Congress for such action as Congress may deem proper in the premises. I prefer not to express any conclusion based upon the

report of the Advisory Board of Army Engineers and upon my own investigation and consideration as to whether Congress should or should not expressly authorize the use of the Hetch Hetchy Valley by the city of San Francisco and its adjacent communities, because I have decided not to base any official action upon such a conclusion now and because if I were now properly authorized to take official action I would prefer to secure some additional information and to give some further consideration to certain features of the matter before taking such action. Among these features are the bases and consequences of the conclusions reached by the Advisory Board that—

the use of the Hetch Hetchy Valley as a reservoir site is necessary if the full flow of the upper Tuolumne is to be conserved

and that—

the San Joaquin Valley is relatively less well provided with water than the Sacramento Valley both as to rainfall and as to run-off of rivers. The demands of the valley for complete irrigation are in excess of the water available.

Many of the conditions which should be attached to any permit are discussed in the report of the Advisory Board of Army Engineers. I do not agree with all of the suggestions there made, and I believe that other equally important terms and conditions should be imposed.

The precise manner under which the work of constructing a dam at the Hetch Hetchy Valley would be carried on under any permit is of the greatest importance if serious risk of injuring the scenic beauty is to be avoided. I believe that a dam and a scenic road and other works proposed by the city can be constructed in such a way as to mar the beauty of the valley little, if at all, and even in some respects to enhance the possibilities of enjoying this beauty. This, however, can result only from conducting the work with the greatest skill and without regard to those considerations of expense which quite uniformly control work of this character. I have no doubt that the city would carry on its operations with a considerable degree of care, but I believe that extraordinary measures of precaution should be taken and that the work should be carried on not merely under plans and specifications approved by the Secretary of the Interior, but that the manner in which the work itself upon the ground is conducted should be subject to supervision by competent representatives selected and employed by him.

The questions connected with the use of water by the Turlock-Modesto district and other irrigation interests, with the development and disposition of the water power, and with many other conflicting interests are so difficult and complicated that suggestions are made either by the city or by the Advisory Board that they be left largely to future disposition by the Secretary of the Interior. The func-

tions thus devolved upon the Secretary and the duties imposed upon him will require the occasional or regular employment of experts, engineers, and other assistants, whose compensation should not be made a charge upon the General Government, but should be paid by the beneficiaries of any permit that may be granted. In fact, in view of the conclusion of the Advisory Board that the saving to the city is the principal determining factor as to any permit, the whole question of the payments which the city should make to the Government as the custodian of the park requires more consideration than has been given to it.

It is conceded that it would be unsound economics for the city of San Francisco to duplicate the existing distributing system and that it should acquire most if not all of the present sources of supply of the Spring Valley Water Company; and the Advisory Board bases its report on this theory. It is the declared intention of the city to purchase these properties as the beginning of its proposed municipal water system and active negotiations have been carried on to this end. These negotiations, however, have thus far proved unsuccessful. I do not wish any action of mine to be open to the construction of expressing any opinion whatever as to the merits of the controversy between the city and the company as to the value of the latter's property, nor as to which portions of the property it would be appropriate for the city to acquire. If they are unable to agree, both parties should be compelled to submit to some impartial tribunal the questions at issue between them, so that the company may receive that to which it is fairly entitled and the city may not be required to pay one dollar more than the real value of the property it should acquire.

These questions, however, are merely illustrations of the large number of important, although relatively minor, provisions of the proposed permit which call for greater consideration, both as to substance and as to the precise manner in which they should be worded, than I have been able to give to them under the existing conditions in the Secretary's office.

Respectfully,

WALTER L. FISHER, *Secretary*.

COAL LAND WITHDRAWALS—FIELD EXAMINATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR.

Washington, March 10, 1913.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: I am advised that instructions issued March 6, 1911 [39 L. D., 544], under the act of June 25, 1910 (36 Stat., 847), have been con-

strued by special agents of your office as referring to all entries and selections within withdrawn areas, including such entries and selections as are made for the surface of lands withdrawn for coal classification or classified as valuable for their coal deposits.

Where such entries and selections are allowable under the acts of March 3, 1909 (35 Stat., 844), or June 22, 1910 (36 Stat., 583), and acts amendatory thereof, and the entrymen or selectors file elections to take patents exclusive of the coal deposits in the land, no necessity exists for field examinations in areas withdrawn for coal classification, or classified as coal lands, where the cases are otherwise regular.

Respectfully,

LEWIS C. LAYLIN,
Assistant Secretary.

NORTHERN PACIFIC LAND GRANT—INDEMNITY SELECTIONS.

OPINION.¹

In selecting indemnity lands for the loss of mineral lands the Northern Pacific Railway Co. is not limited to the State in which the loss occurred.

The company may select as indemnity lands within the primary limits, which at the time the grant attached were "reserved, sold, granted, or otherwise appropriated," but which have since been relieved of that impediment and at the time of the selection are unoccupied or unappropriated public lands.

The indemnity selection for lost mineral lands may be made within 50 miles of the line of the road.

Where there is a discrepancy between the printed statutes and the enrolled act the latter will control.

DEPARTMENT OF JUSTICE,
July 24, 1912.

SIR: I have the honor to reply to your letter of December 12, 1911 [41 L. D., 574, 576], requesting an opinion concerning certain indemnity lands selected by the Northern Pacific Railway Co. in lieu of lands lost from the primary grant because of their mineral character.

The bases assigned in support of these selections are lands in the State of Montana which have been classified and approved as mineral under the act of February 26, 1895. (28 Stat., 683.) The selections were made under the last proviso to section 3 of the act of July 2, 1864. (13 Stat., 365.)

The material portions of section 3 are as follows:

Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of

said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, ... *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, *and within fifty miles thereof*, may be selected as above provided.

The underscored words "*and within fifty miles thereof*," in the above quotation do not appear in the act as published in the Statutes at Large, but are in the act as passed and approved, and as recorded in the State Department.

The lands selected are in the Wausau land district, in Wisconsin. They are all of odd-numbered sections, and all but two are within the 20-mile or primary limit. These two, however, are situated outside both the primary 20-mile limit and the secondary 10-mile limit, but are in fact within "fifty miles" of the line of road as definitely located.

You request an opinion upon the three following questions:

1. In the matter of indemnity for mineral lands excluded from its grant, is the company limited to the State in which the loss occurred?
2. May the company select, as indemnity, lands within the primary limits, which, at the time the grant attached, were "reserved, sold, granted, or otherwise appropriated," but which since said time, have been relieved of said impediments and are, at the time of the selection, unoccupied and unappropriated public lands?
3. Are lands lying "more than 10 miles beyond the limits of said alternate sections" granted by the act of 1864, but "within 50 miles" of the line of road, subject to selection as indemnity for mineral lands lost to the grant by reason of exclusion under the terms thereof?

It appears from the legislation in question that it was the intention of Congress to give to the Northern Pacific Railroad Co. every alternate odd-numbered section of land throughout a strip 40 miles wide on each side of the road in the Territories and 20 miles wide in the States; and the particular sections given were automatically fixed upon the filing and approval of the map of the right of way. If, for any of the reasons mentioned in the statute, the United States could not give good title to any agricultural sections within this primary belt, the company was to have in lieu thereof a similar amount of land within an adjoining belt 10 miles wide; and such lieu sec-

tions were also to be alternate and odd-numbered and were to be selected under the direction of the Secretary of the Interior.

All mineral lands were excepted from this grant, in lieu of which a like quantity of agricultural lands in odd-numbered sections nearest to the line of railway and within 50 miles thereof was to be selected.

1. I am of the opinion that in selecting indemnity lands for the loss of mineral lands the company is not limited to the State in which the loss occurred. Attorney General Garland thus answered the question, so far as losses of agricultural lands were concerned, in his opinion of January 17, 1888 (19 Op., 88), and this ruling has been consistently followed by your Department.

Northern Pac. R. R. Co. (on review) (20 L. D., 187).

Northern Pac. R. R. Co. *v.* Shepherdson (24 L. D., 417).

Hagen *v.* Northern Pac. R. R. Co. (26 L. D., 312).

There is no reason for a different ruling in regard to mineral losses.

2. I am of the opinion that the company may select as indemnity lands within the primary limits, which at the time the grant attached were "reserved, sold, granted, or otherwise appropriated," but which have since been relieved of that impediment and at the time of the selection are unoccupied or unappropriated public lands.

While there is some apparent conflict in the decisions on this question, I think the true rule is laid down by the Supreme Court in *Ryan v. Railroad Co.* (99 U. S., 382), and *United States v. Southern Pacific Co.* (223 U. S., 565). See also 26 L. D., 452, and 29 Op., 124, 129, 130.

In the *Ryan* case, the grant to the California & Oregon Railroad Co. was in terms similar to those of the grant involved here; at the time of the grant a part of the land within the indemnity belt was subject to a Mexican claim, which was subsequently rejected, and a patent issued to the railroad for this as indemnity land. *Ryan*, a homesteader, later settled on the same section and also received a patent. In a suit between them to determine the lawful title, the court admitted that at the time of the original grant, the section, being *sub judice*, would not have been public land within the meaning of the statute, but by the subsequent dismissal of the claim it had become so, and was as open to selection by the railroad as any other land within the indemnity belt.

In *United States v. Southern Pacific Company* (223 U. S., 570), Mr. Justice Holmes, speaking of the *Ryan* case, said:

An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, *but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice.* * * * It seems to us, in short, that *Ryan v. Railroad Com-*

pany, *supra*, should be taken to establish a general principle and should not be limited to its special facts.

This construction seems to me to accomplish the purpose of Congress. Undoubtedly Congress intended that the railroads should have these odd-numbered sections within the primary limits in return for the accomplishment of its great enterprise. The exception of lands to which other claims had previously attached was not designed to serve as a technical pretext whereby that which had been granted might thereafter be withdrawn. It was created for the purpose of protecting homesteaders and others who might settle upon the lands before the railroad's line was definitely located. It is wholly unnecessary to the accomplishment of this purpose that after these homestead claims have ceased to exist their temporary interposition should continue to be effectual to prevent the accomplishment of the underlying intent of Congress. And although the fiction of the *gift in presenti* may properly prevent their passing under the primary grant, I see no reason why they should not be subject to selection as indemnity lands, at least under provisions phrased like the mineral indemnity proviso in the present charter.

3. Your third question involves the question whether the published statute or the act as passed and enrolled and recorded in the State Department is to control.

It is my opinion that the law as passed by Congress ought not to be altered by a printer's error. "Where there is a discrepancy between the printed statute and an enrolled act all the authorities agree that the latter controls." Lewis' Sutherland on Statutory Construction (sec. 74) and cases there cited. See also Bishop on the Written Laws (sec. 37); *Clare v. State of Iowa* (5 Iowa, 509); *State v. Marshall* (14 Ala., 411); *State v. Byrum* (60 Neb., 384); *Johnson v. Barham* (99 Va., 305).

I am, therefore, of the opinion that the indemnity selection for lost mineral lands may be made within 50 miles of the line of the road.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE INTERIOR.

NORTHERN PACIFIC RY. CO.

DEPARTMENT OF THE INTERIOR,

Washington, December 12, 1911.

SIR: There is pending in this Department, for consideration and action, Clear List No. 10, of lands selected on behalf of the Northern Pacific Railway Company, embracing 1,840.70 acres, in the Wausau land district, Wisconsin.

The bases assigned in support of these selections are lands in the State of Montana which have been classified and approved as mineral under the provisions of the act of February 26, 1895 (28 Stat., 683), and the lands selected are all of odd numbered sections.

These selections were made under the last proviso to section 3 of the act of July 2, 1864 (13 Stat., 365), which reads as follows:

That all mineral lands be, and the same are hereby, excluded from the operations of this Act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, *and within fifty miles thereof*, may be selected as above provided.

The words underscored, "*and within fifty miles thereof*," do not appear in the law as published in the Statutes at Large, but do appear in the act as actually passed and approved, as shown by the records in the Department of State. The discovery of this omission in the act as published gives rise to one of the questions here involved.

All but two of the tracts involved in the present selection are situate within the 20-mile, or primary limits, the two remaining tracts being situate outside of the primary and beyond the 10-mile indemnity limits, but within "fifty miles" of the line of road as definitely located.

In this matter, I have the honor to request your opinion upon the three following questions involved:

1. In the matter of indemnity for mineral lands excluded from its grant, is the Company limited to the State in which the loss occurred?

2. May the Company select, as indemnity, lands within the primary limits, which, at the time the grant attached, were "reserved, sold, granted or otherwise appropriated," but which, since said time, have been relieved of said impediment and are, at the time of the selection, unoccupied and unappropriated public lands?

3. Are lands lying "more than 10 miles beyond the limits of said alternate sections" granted by the act of 1864, but "within 50 miles" of the line of road, subject to selection as indemnity for mineral lands lost to the grant by reason of exclusion under the terms thereof?

For your consideration in connection with the matter, I transmit herewith, the opinion of the Assistant Attorney-General for the Department of the Interior upon the questions involved [41 L. D., 576].

I have advised Messrs. Britton and Gray, of this City, counsel for the Company, of the submission of the matter to you for your opinion, have furnished them with a copy of the opinion of the Assistant Attorney-General, and have advised them that, if it meets

with your approval, I shall have no objection to them submitting to you their views on the subject.

Very respectfully,

WALTER L. FISHER,
Secretary.

THE ATTORNEY-GENERAL.

NORTHERN PACIFIC RY. CO.

(See opinion of Attorney-General, 41 L. D., 571.)

Opinion of Assistant Attorney-General Cobb to the Secretary of the Interior, December 12, 1911.

Under date of September 24, 1909, the Commissioner of the General Land Office transmitted for your approval Clear List No. 10, of lands selected on behalf of the Northern Pacific Railway Company, embracing 1,840.70 acres in the Wausau land district, Wisconsin.

The bases assigned in support of these selections are lands in the State of Montana which have been classified and approved as mineral under the provisions of the act of February 26, 1895 (28 Stat., 683), and the lands selected are all of odd-numbered sections.

By section 3 of the act of July 2, 1864 (13 Stat., 365), there was granted to the Northern Pacific Railroad Company—

Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said Company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections . . . *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this Act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, *and within fifty miles thereof*, may be selected as above provided.

The words underscored, "*and within fifty miles thereof*," do not appear in the law as published in the Statutes at Large, recent discovery of the omission being responsible for one of the questions

in the present controversy, which arises out of this attempt on the part of the Northern Pacific Railway Company, successor in interest of the Northern Pacific Railroad Company, to select 1,840.70 acres in the Wausau land district, Wisconsin, in lieu of lands within the granted limits in the State of Montana lost to the grantee by reason of their being mineral in character.

All but two of the tracts involved in the present selection are situate within the twenty-mile, or primary limits, the two remaining tracts being situate outside of the primary and beyond the ten-mile indemnity limits, but within "fifty miles" of the line of road, as definitely located.

The Railroad Company contends:

1. In the matter of indemnity for mineral lands excluded from its grant, it is not limited to the State in which the loss occurred;

2. That for mineral lands lost to its grant, it may select, as indemnity, lands within the primary limits, which, at the time the grant attached, were "reserved, sold, granted, or otherwise appropriated," but which, since said time, have been relieved of such impediment, and were, at the time of selection, unappropriated public lands; and

3. That the lands lying "more than ten miles beyond the limits of said alternate sections," granted by the act of 1864, but "within fifty miles" of the line of road, are subject to selection as indemnity for mineral lands lost to the grant by reason of exclusion under the terms thereof.

It is proposed to submit the questions involved to the Attorney-General for his opinion, and you have directed me to prepare an opinion expressing my views on the subject for your advice and for transmission to the Attorney-General for his use in consideration of the matter.

With reference to the first proposition, "in the matter of indemnity for mineral lands excluded from its grant, it is not limited to the State in which the loss occurred," Attorney-General Garland, in an opinion reported in 8 L. D., 14, had under consideration the following question involving the construction of the granting act of 1864: "The question of selections to be made within the first belt for losses outside the particular State or Territory in which the same occurred," the losses there referred to being on account of the United States not having "full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims, or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office."

As to which question, the Attorney-General said:

A continuous line is provided for. No state or territory is even named in it save as the starting point and terminus of the line. State and territorial lines are not mentioned, nor in any way recognized as constituting divisions which direct the continuity. On this indeterminate line, alternate sections are granted to the amount of ten per mile on each side within the states and twenty within the territories. Whenever lands shall have been lost to the Company from the amount granted within the primary limits, by previous settlement, or purchase, the act declares:

"Other lands shall be selected by said Company in lieu thereof, under directions of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

This clause, as a whole, provides for an indemnity of lands lost out of the amount granted. The conditions of this indemnity, set forth in detail, under which the right, or privileges, of selection rests in the Company are, lands shall have been lost out of the amount granted; selection must be made by the Company of other lands in lieu of them; these selections must be made under the directions of the Secretary of the Interior; selections shall only be of alternate odd numbered sections, and they must not be more than ten miles beyond the limits of the granted sections. These are all the limitations or conditions provided for by the Act of 1864, subject to which the right to select is granted. Interpretation will not warrant the adding of another limitation that the lieu lands must be selected in the same state or territory in which the lands were lost. To annex such additional limitation to the words of the grant would be legislation and not construction.

The reasoning and conclusion of the Attorney-General seem to me unanswerable. Indeed, the rule there announced has ever since been uniformly followed by the Department. For example, see the following cases: Northern Pacific Railway Company, 20 L. D., 187; Northern Pacific Railway Company *v.* Shepherdson, 24 L. D., 417; Hagen *v.* Northern Pacific Railway Company, 26 L. D., 312.

By the proviso with reference to mineral lands the act declares:

The same are hereby excluded from the operations of this act and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road and within fifty miles thereof, may be selected.

With reference to this provision, as with the case of lands lost by reason of existing claim, or reservation, the conditions for the selection of indemnity are specifically set forth in the act to be that the selected lands must be (a) unoccupied; (b) unappropriated; (c) agricultural; (d) odd numbered sections; (e) nearest line of said road; and (f) within fifty miles thereof. Here, as in the case of selection for actual loss, there is no limitation by reference to State or Territorial boundaries as to the place of selection, and "interpretation will not warrant the adding of another limitation that the lieu lands must be selected in the same State or Territory in which the lands were lost. To annex such an additional limitation to the words of the grant would be legislation and not construction."

What seems to be complete evidence of the intention of Congress in this matter, and which was referred to by the Attorney-General in his opinion, is its action in adopting the joint resolution of May 31, 1870 (16 Stat., 378). It appeared to Congress at that time that the surveys for the location of the line of the company's road had invited and encouraged settlement upon, and caused disposition of, the public lands along the line of the road to such an extent that it became apparent it would be impossible for the company to receive the full complement of its grant within the limits provided in the act of 1864, and, by this resolution, it was provided, *inter alia*, that:

in the event of there not being in *any State or Territory* in which said main line or branch may be located, at the *time of the final location thereof*, the *amount of lands* per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch line, *except mineral* and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, *to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four*.

This resolution had no reference to mineral cases at all, as appears on its face. It shows in itself that the reason for its passage was that the surveys and prospective building of the road had brought settlers along its proposed line, and that when definite location was made and the grant thus attached, it would be found that by reason thereof, such large quantities of "said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of," that the grant would have become very largely impaired and the indemnity belt too small to make it up. Consequently, Congress adopted this resolution, making a second indemnity belt, but, after consideration, concluded to limit the taking of the indemnity in any State or Territory in the additional belt, to the same State or Territory wherein the loss occurred. This intention becomes clearly demonstrated by reference to the record of the proceedings and debate on this resolution in Congress. It had relation solely to the general indemnity provisions in the first part of section 3 of the act of 1864, and none at all to the mineral indemnity provision of the section. This action of Congress shows, as clearly as could be done, that the original and continuing intention of Congress was that selections in the original general indemnity belt, and in the fifty-mile mineral indemnity belt, might be made in any State or Territory regardless of the State or Territory wherein the loss occurred. Congress was not at a loss to find and

adopt apt words to show its intention otherwise, when it concluded to do so in 1870 as to the second indemnity belt for general losses. As said by the Attorney-General:

The language "in such state or territory," or some equivalent language, would doubtless have been found in the original act of 1864, had it been the intent of Congress to limit the selection to the State or Territory in which the lands were lost. In the absence of any such words, I do not feel authorized to interpolate them as an additional limitation to the law as enacted.

We thus, in this case, have clear evidence of the wisdom of the law that when the language used in a statute is plain, certain, and unambiguous, a departure from its natural meaning is not justified; and it is the plain duty of a court, or of the land department, to give it force and effect.

As to the second proposition, the precise question was considered by this Department March 3, 1898, in the case of Southern Pacific Railroad Company (26 L. D., 452). In that case the Southern Pacific Railroad Company had selected certain indemnity lands on account of losses in its main-line grant made by the act of July 27, 1866 (14 Stat., 292). The lands selected were portions of odd numbered sections within the 20-mile or primary limits of the grant and had been covered by homestead entries at the date of the definite location thereof, which entries had been afterwards canceled, and the lands selected were at the date of such selection free from adverse claims. The selections were made in lieu of certain tracts lost to the grant by reason of their mineral character and were made under section 3 of said act of July 27, 1866, which provides, among other things:

That all mineral lands be, and the same are hereby, excluded from the operations of this act and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road and within twenty miles thereof may be selected as above provided.

That decision closes as follows:

It will be observed that the selections in lieu of lands lost to the grant, by reason of their mineral character are limited to the same sections purported to be carried by the grant, namely, the odd numbered sections nearest to the line of said road, and within twenty miles thereof. Without discussing this peculiar provision of the act the selections in question meet the terms thereof and as they are free from other claim or right I have approved the list submitted which is herewith returned as a basis for patent.

The indemnity provision of said act, under which the selections there involved were made and approved, is *ipsissimis verbis* of the indemnity provision of the act of July 2, 1864, *supra*, here under consideration, except that in the first-named act the right of selection was limited to a territory within "twenty" miles of the line of road, while here it is limited to a territory within "fifty" miles of the line

of road. The difference is of no importance. Indeed, if there be a real difference, the question involved in the Southern Pacific case was of more difficult analysis in arriving at the conclusion therein reached, than in the act here under consideration, because, as above shown, the language of the former act could only operate upon the lands within the primary limits of the grant, and could be made effective only upon the happening of the condition that such lands were for any reason excepted from the operation of the grant. Upon the authority of that case, unless it is to be overruled, this second contention of the company must be sustained.

I see no reason for departing from the doctrine of that case, and believe the conclusion there reached to be the only possible one, and that it is applicable to this present case. Congress has clearly and simply expressed its intention to, under certain conditions, grant indemnity within the place limits for mineral losses. At the time of definite location, for instance, it is found that certain land is "occupied by a homestead settler." The grant does not, therefore, attach, nor title vest in the company; it is lost to the company. Subsequently, the entry is cancelled and the land becomes at once of the mineral indemnity character, "unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road and within fifty miles thereof."

Now, why may it not be selected for a mineral loss, when the act simply says it may? I do not see much about that to argue.

However, it might be added that by allowing the company to make just such selections the very lands which it was thought by Congress it should have, it would get, to-wit, those nearest to the line of the road; and would get, by indemnity selection, the very land Congress saw fit to subtract from the public domain and give to the company.

There remains but the third proposition, that relating to lands lying beyond the limits of the grant as originally established under the act of July 2, 1864, but within fifty miles of the line of the road, and the selection of the same as indemnity for mineral lands lost to the grant by reason of exclusion under the terms thereof.

This is the first case presented to the Department wherein selection has been made of such lands. The question to that extent is new. It was, however, considered by the Department in 1908, after the discovery of the error in the printed volume of the statutes, and the order of May 14, 1908, in the form of an approval of a communication from the Commissioner of the General Land Office, was made by the Department, in which, after calling attention to the discovery of the error in the printed statute, it is said:

In view of the limitations thus placed upon the area for selection of the indemnity, the company asks that the fifty-mile limit may be laid down in

Wisconsin, Minnesota and Oregon (the other states already having such limit established), in which mineral indemnity selections may be made.

In view of the terms of the statute, it would appear imperative that such limits should be established in order to avoid selections beyond the limitation of the law, and I recommend that the establishment of same be authorized.

There is no difficulty, however, in disposing of this question. No difficulty unless that which would attend upon a notion that the policy of the Department ought to be different from that of the *law*, and for the purpose of carrying it out, judicial legislation should be indulged in.

The facts are as follows:

The bases assigned in support of the selection are mineral lands, and for the purposes of this adjustment they were mineral lands at the date of the grant. They were, therefore, "excluded from the operations" of the act, and excluded from the grant. The lands selected "in lieu thereof," constitute "a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections." They are the nearest available lands to the line of said road, and thus, under the proper and well-established rule of the Department are "nearest to the line of said road;" and they are "within fifty miles thereof." The selections thus, literally and absolutely, come within the terms of the statute, and answer every single condition therein contained. They should, therefore, be approved, unless something be added to, or subtracted from, the language of the statute; and that the Department has no power to do.

The language of this statute is too plain to be construed. It speaks for itself. As said before, it is plain and certain. The language employed, and the words used, are particularly free from ambiguity and doubt, and are susceptible of but one interpretation. There being no room for doubt, no rule of "construction" may be employed to change the clear import thereof. If the language used in this statute does not give the company the right to select for mineral losses, indemnity "within fifty miles" of the line of road, then what different words would or could be employed for that purpose? This is unanswerable.

This Department may not concern itself with the causes which impelled Congress to provide this particular indenmity area for mineral losses. Many good and sufficient reasons demonstrating the propriety and wisdom of the action at that time may be suggested, but no useful purpose will be subserved by a discussion of them here. It is proper to say, however, that the proceedings in Congress out of which this statute came, demonstrate that the words "and within fifty miles thereof," were deliberately inserted after full considera-

tion. As originally introduced, the bill contained this proviso, in the following language:

Provided further, That all mineral lands be and the same are hereby excluded from the operation of this act, and in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands nearest to the line of road may be selected as above provided.

It thus passed the House. When it reached the Senate the latter's committee reported against this provision and it went into conference. There these words were added, as were also the words limiting the selections to odd-numbered sections, and as thus amended, it passed both the House and the Senate, and was approved. Without considering whether the original intention was to allow the company to make selections for mineral losses anywhere, without limitation, and without regard to number of sections; or, whether, in view of the final words of the clause, "as above provided," it was the intention to direct that mineral losses should be indemnified from the same limits provided in the preceding general indemnity clause of the act; the fact remains that, after considering all these things, Congress finally and deliberately arrived at a conclusion, and has expressed that conclusion, in a written law, in words plain, simple, certain and unambiguous, such as require and will allow no "construction" whatsoever. The plain and simple duty of the land department is to follow it.

I conclude, therefore, that the selections should be allowed, and the lists approved.

AGRICULTURAL ENTRIES OF OIL AND GAS LANDS IN UTAH.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, October 17, 1912.

REGISTER AND RECEIVER,

Salt Lake and Vernal, Utah.

SIRS: I invite your attention to the enclosed copy of the act of August 24, 1912 (37 Stat., 496), entitled "An act to provide for agricultural entries on oil and gas lands," which, as you see, applies only in the State of Utah.

The act is similar to the act of June 22, 1910 (36 Stat., 583), providing for agricultural entries on coal lands, as amended by the act of April 30, 1912 (37 Stat., 105). The circulars of September 8, 1910 (39 L. D., 179), No. 117 of May 23, 1912 [41 L. D., 30], and No.

128 of June 14, 1912 [41 L. D., 89], can be followed in dealing with the act of August 24, 1912 (37 Stat., 496), with such changes as the nature of the act would necessitate, such as substituting the word "oil" for "coal", and changing the endorsement required by paragraph 7 to relate to the act of August 24, 1912 (37 Stat., 496).

You will observe that the provision of the act of June 22, 1910, *supra*, that—

homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the act approved February nineteenth, nineteen hundred and nine, entitled "An act to provide for an enlarged homestead,"

is omitted from the act under consideration. Homestead entries for oil and gas lands in Utah, therefore, are subject to all of the provisions of the act of June 6, 1912 (37 Stat., 123).

You will also notice particularly the last sentence of the act of August 24, 1912 (37 Stat., 496), to wit: "The reserved oil and gas deposits in such lands shall be disposed of only as shall be hereafter expressly directed by law." No prospecting on such lands can, therefore, be initiated until there is some legislation providing for the disposal of oil and gas deposits therein.

At the same time bear in mind that the act contains no provision for the presentation of applications to locate, enter or select, under land laws of the United States, lands which have been withdrawn as valuable for petroleum, with a view of proving that the lands are not valuable therefor and securing a patent without reservations.

Very respectfully,

JOHN MCPHAUL,
Acting Assistant Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

BENNETT ET AL. v. MOLL.

Decided December 19, 1912.

MINERAL LAND—DEPOSITS OF PUMICE OR VOLCANIC ASH.

Land of little value for agricultural purposes, but which contains extensive deposits of finely divided pumice or volcanic ash, suitable for use in the manufacture of roofing materials and abrasive soaps, and having a positive commercial value for such purposes, is mineral land and not subject to disposition under the agricultural laws.

ADAMS, *First Assistant Secretary:*

John P. Bennett *et al.* have appealed from the Commissioner's decision of May 12, 1911, dismissing their protest against the home-

stead entry 06390 of Frank J. Moll for the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 14, T. 10 N., R. 51 W., Sterling land district, Colorado.

The entry was made March 22, 1909. January 19, 1910, John P. Bennett, Joseph Bennett, and W. H. Bennett filed application for patent 010555 to the Base Bullion placer mining claim, embracing a portion of the land covered by said entry, to wit, the S. $\frac{1}{2}$ SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE $\frac{1}{4}$ NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said section 14. This application was, at the time of its presentation, suspended by the local officers because of its conflict with the homestead entry.

January 31, 1910, the above mentioned protest was filed. It is sworn to by John P. Bennett, on behalf of himself and his coclaimants of the Base Bullion mining claim, and charges, in substance and effect, that said claim was originally located May 21, 1903, and was relocated by them December 14, 1907; that the ground embraced therein is mineral in character and more valuable for mineral than for agricultural purposes, and was so known by the homesteader at the date of said entry; that it contains a large bed of mineral known as "silica" of which the protestants have shipped large quantities; that the boundaries of said mining claim are plainly monumented on the ground and that the homesteader wrongfully and fraudulently sought to embrace the same in his entry.

After due notice, hearing was had on the protest May 22, 1910, resulting in a finding by the local officers that the land is chiefly valuable for agricultural purposes and that the allegations of the protest were not sustained; they recommend, therefore, that the protest be dismissed. On appeal, the Commissioner, in the decision here appealed from, found and held that the land contains nothing in the shape of mineral save a deposit of sand; that—

No special value of this sand over other sand deposits is shown by the evidence, and in view of the fact that deposits of sand occur with considerable frequency in the public domain indicates that such deposits, unless they possess a peculiar property or characteristic giving them a special value, are not to be regarded as mineral. See case of *Zimmerman v. Brunson* (39 L. D., 310). Therefore, it is adjudged that contestants have not shown a discovery of mineral upon said land, or that they have a valid mining claim thereon, or that the land is mineral in character.

The action of the local officers was accordingly affirmed and the protest dismissed. The Commissioner further held the mineral application of protestants for rejection.

The evidence adduced on the part of the protestants shows that the particular area involved in the protest is generally rough and traversed by draws; that the surface thereof is gravelly and only a small portion susceptible of cultivation to crops; that nothing has ever been grown thereon save buffalo grass and weeds, insufficient in quantity to support a steer for a year. Underlying the surface

gravel, whose maximum thickness does not exceed twenty-eight inches, there has been disclosed throughout the entire area a deposit of what protestants and their witnesses denominate "silica," which, it is testified, was analyzed and found to contain 95% silica and 5% magnesia. This deposit is shown to be at least thirty-five feet thick throughout practically the entire area. From February 20, 1908, to November 8, 1909, nine car loads of this material of the total weight of 294 tons, were shipped by the mineral claimants to the Western Elaterite Company of Denver, the Chicago Asbestos Company of Chicago, the Elaterite Roofing Company of Denver, the Michael Heating Company of Denver and the Haskins Brothers Soap Company of Omaha. The earlier shipments brought a price of \$1.75 per ton f. o. b. cars near the land, but later shipments were made at the price of \$2.25 per ton. One of the protestants testifies that, at the date of the hearing, he had an order for another car load of the material. The use to which the substance has been put is not disclosed by the record and can only be surmised from the names of the companies to which it has been shipped. It is fair to assume, however, that it is suitable for use in the preparation of roofing materials and in the manufacture of abrasive soaps. A sample of the substance was submitted in evidence. The protestants testified that it is "silica" and the Commissioner refers to it merely as "sand." A microscopic examination of the same, however, shows that it is not silica or, in the proper sense of the term, sand, but a finely divided pumice or volcanic ash, which is a silicate and not silica. But, for the purpose of the determination of this case, it is immaterial whether it is "silica" or pumice. It is clearly a mineral substance and, moreover, possesses a positive commercial value, as is evidenced by the fact, as testified by the protestants, and not denied, that it brings a price of \$1.75 to \$2.25 per ton f. o. b. cars at the railroad station or siding nearest the land. That material of this nature possesses a commercial value is further shown by reference to Part II, Mineral Resources of the United States for the Calendar year 1910, published by the United States Geological Survey, wherein, at page 695, it is stated that, during the years from 1906 to 1910, inclusive, 69,257 tons of pumice of the total value of \$218,237 was produced in the United States, principally from the same section of the country in which the land here in question is situated. On the same page of said publication, it is said, with reference to that industry: "The business is reported good and the returns show a more prosperous condition in the industry than ever previously reported by the Geological Survey." It is testified by protestants, and not denied, that the particular area here in controversy is rough and broken and that the surface is generally of a gravelly nature. One

of the protestants testifies that not to exceed 10 acres, in small disconnected patches, are susceptible of cultivation, and one of their witnesses testifies that from 15 to 20 acres thereof can not be cultivated. Witnesses for the protestee, while giving it as their opinion that the land embraced in the homestead entry generally is worth from \$25 to \$30 per acre, for agricultural purposes, make no specific reference to the particular area here in controversy. No attempt is made on behalf of the protestee to show that any crop, except possibly grass, can be produced from the area in question. Under all the circumstances of the case, the Department is convinced that the land is essentially mineral land, and hence not subject to disposition under the agricultural laws.

The decision of the Commissioner is, therefore, reversed and the homestead entry will be canceled, to the extent of the area in conflict, and, in the absence of other objection, the mineral claimants will be permitted, after due publication and posting, as required by the statutes, to proceed with proof upon their pending application.

The cancellation of the homestead entry, as to the area in conflict, will render the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ noncontiguous to the other portion of the entry. The homesteader will, therefore, be called upon to show cause why the entry should not also be canceled, as to said noncontiguous tract.

BENNETT ET AL. v. MOLL.

Motion for rehearing of departmental decision of December 19, 1912, 41 L. D., 584, denied by First Assistant Secretary Adams, April 22, 1913.

ALLEN v. FLEMING.

Decided January 10, 1913.

ISOLATED TRACT—NOTICE OF OFFERING.

Under the act of June 27, 1906, the publication of notice for at least thirty days preceding the date of offering for sale of an isolated tract is essential to the jurisdiction of the local officers to make the sale; and a sale made on a publication of less than thirty days is invalid and can not stand.

JURISDICTION OF LOCAL OFFICERS—REPUBLICATION AND REOFFERING.

An order by the Commissioner of the General Land Office to sell an isolated tract contemplates the offering of the land for sale after legal notice has been given, and where, after offering and accepting a bid for the land, the local officers discover that the notice of sale was defective, they have jurisdiction, without further order from the Commissioner, to direct republication of notice and to reoffer and sell the land in accordance therewith.

REPUBLICATION AND REOFFERING—NOTICE—APPEARANCE AT SALE.

Where, on account of defect in the publication of notice of the offering of an isolated tract, republication and reoffering are had, and the applicant at whose instance the original offering was made appears and bids at the reoffering, the sale made to another, a higher bidder, at such reoffering, will not be set aside on the ground that the applicant did not receive proper notice of the time and place of the reoffering.

ADAMS, First Assistant Secretary:

Harriet Allen filed application for the sale of an isolated tract, described as lot 1, Sec. 18, T. 14 N., R. 22 E., M. M., Lewistown, Montana, land district, and by office letter "C" of August 12, 1911, the local officers were authorized to make said sale. Notice was issued and published in a weekly paper, beginning with issue of September 15, 1911, and ending with issue of October 13, 1911, the latter being the date on which the sale was to take place, at 10:00 o'clock a. m. On the latter day the local officers received the bid of Allen of \$1.25 per acre, and issued receipt to her for the money paid. Cash certificate, however, was not issued, as the local officers discovered that the publication was defective, and accordingly directed republication of notice fixing November 25, 1911, as the date upon which sale should be had.

November 25, 1911, Allen appeared and bid on the land, as did also one John J. Fleming, and the land was sold to the latter for \$10.75 per acre, he being the highest bidder at such sale. Cash certificate issued to him.

January 3, 1912, Allen filed protest, objecting to the sale of the land to Fleming, and asking that the sale be set aside, asserting that the local officers erred in offering the land for sale, as the former sale to Allen was valid. From a decision of the Commissioner of the General Land Office, dated February 15, 1912, requiring Allen to make further showing in the form of an affidavit that she would bid more than \$10.75 per acre for the land, the price bid by Fleming, before a resale would be ordered, this appeal is prosecuted to the Department.

The first contention made by claimant on appeal is that the local officers erred in ordering a republication of the notice, and were, in fact, without jurisdiction to take such action because the publication of the first notice was in accordance with the instructions of June 6, 1910 (39 L. D., 10), which provides in paragraph 9, "Notice must be published once a week for five consecutive weeks." The act of June 27, 1906 (34 Stat., 517), which authorizes the Commissioner of the General Land Office to order into market and sell lands at public auction as isolated tracts provides that—

it would be proper to expose for sale after at least thirty days notice by the land officers of the district in which such lands may be situated.

The first publication of notice in this case was only 28 days prior to the date fixed for the sale, and under the act above cited, was insufficient. As such notice is jurisdictional the local officers were without authority to sell the land to the claimant upon her bid of \$1.25.

As to the jurisdiction of the local officers to issue a second notice, it appears that their authority to sell such tracts is dependent upon instructions from the Commissioner in each particular case. Under the instructions of June 6, 1910, the local officers are directed to issue notice and make sale after having received notice from the Commissioner directing them to make such sale. Paragraph 12, of said instructions provides—

After each offering, when the lands offered were not sold, the local officers will report by letter to the General Land Office.

In the present case the Commissioner authorized the local officers to make the sale in question but such sale could not be made until the legal publication of the notice had been had in accordance with the instructions above cited, and the act of June 27, 1906, *supra*.

The instructions above quoted contemplate the offering of land for sale after legal notice has been issued, but in case no sale is made for lack of bidders or any cause other than proper procedure, notice should be given to the Commissioner. In the present case, legal notice had not been given, and as the local officers had been authorized, pursuant to instructions of June 6, 1910, to proceed with the sale, there appears no reason why they could not order a republication of such notice. The Commissioner erred in his decision from which this appeal is prosecuted, in stating that the local officers were without authority in directing republication of notice.

It is next contended that the appellant did not receive proper notice of the re-offering of the land in question for sale. It appears that the local officers addressed a letter to her at her former address, and not the address given at the time she filed the present application, and she claims not to have received the same. It appears, however, that she was informally notified of the date of this sale, and that she appeared at said sale and bid upon the land. As she was accorded ample opportunity to offer her bid to purchase this land, she was not in any way injured by this error on the part of the local officers, and the sale will not be set aside upon a mere technicality.

It is unnecessary to consider the other specifications of error made by the appellant in view of the conclusions reached herein. There appears no reason why the sale to Fleming should not be upheld. Due notice of said sale was given and published, and as the local officers, as above stated, had jurisdiction to issue such notice, no

valid objection exists to such sale, which was in all respects, as appears by this record, a valid sale, and must be sustained.

The decision appealed from is accordingly reversed. The protest of Allen is dismissed.

PRACTICE—PROTESTS AGAINST APPLICATIONS FOR PERMITS FOR DEVELOPMENT, TRANSMISSION, AND USE OF POWER.

SPECIAL RULES OF PRACTICE.

RULE 1. Protests by any interested person against the allowance of an application for a permit for the development, transmission, and use of power under the act of February 15, 1901 (31 Stat., 790), may be made on the following grounds:

(a) That the proposed occupancy and use of public lands will not be in accord with the most beneficial utilization of the resources involved.

(b) That the works to be constructed under any such proposed permits are incompatible with works operated or constructed or to be operated or constructed;

(c) That the use of water under any such proposed permit is incompatible with uses of water made or proposed to be made in a lawful manner.

RULE 2. Contests initiated by persons seeking to acquire title to or claiming an interest in the land actually involved in and affected by such development, and relating to conflicts of occupancy rather than to incompatibility of use, will be governed by the general Rules of Practice of the Department.

RULE 3. Any person desiring to file a protest, as provided in Rule 1, must file in duplicate with the Director of the Geological Survey, Washington, D. C., a statement under oath containing:

(a) Name and residence of the protestant or protestants;

(b) Description of the application against which protest is made, including name of applicant and serial number of application;

(c) Complete statement of facts constituting the grounds for the protest, and where use or contemplated use of either works or right to water is alleged, incompatible with pending application protested, the manner of such use and authority under which same is to be asserted or used should be given. This statement should also include a description (by serial number, if possible) of any alleged incompatible applications, either pending or approved, in which the protestant is interested.

(d) Application to submit evidence in proof of such facts;

(e) Address to which papers intended for protestant shall be sent.

RULE 4. Notice of such protest shall be served personally on the adverse party by the protestant. Such service may be made by any

person over the age of eighteen (18) years, or by registered mail; when service is made by registered mail, proof thereof must be accompanied by post-office registry return receipt showing personal delivery to the party to whom the same is directed; when service is made by person, proof thereof shall be by written acknowledgment of the person served or by affidavit of the person serving, showing personal delivery to the party served.

RULE 5. Unless notice of protest is personally served and proof of such service made within thirty (30) days after the filing of such protest, the protest shall abate.

RULE 6. Within thirty (30) days after the notice of protest shall have been served, the party served shall file with the Director of the Geological Survey an answer thereto, under oath, together with proof of service of a copy of such answer upon the protestant.

RULE 7. The protestant will then be allowed fifteen (15) days from the service of the answer to the protest within which to submit to the Director and serve upon the applicant proof of the facts constituting his ground for protest, and the applicant will be allowed a like period from the service of such proof within which to submit proof of facts in rebuttal.

RULE 8. Thereafter no additional evidence will be considered by the Director unless offered under stipulations of the parties, except that he may in his discretion order further investigations made or evidence submitted.

RULE 9. The Director will cause notice to be given to the applicant and to the protestant of any order or decision affecting the merits of the case or the regular order of proceedings therein. Oral argument will not be heard by the Director of the Geological Survey.

RULE 10. After the filing of all required papers or after the expiration of the period which may be allowed for their submission, the Director of the Geological Survey will consider the evidence submitted and transmit the record in the case with his report and recommendation thereon to the Secretary of the Interior for consideration and final action.

RULE 11. Oral argument of any protest pending before the Secretary of the Interior on report from the Director of the Geological Survey will be allowed, in the discretion of the Secretary, at a time fixed by him and upon written notice to both parties.

These special Rules of Practice will be effective on and after January 1, 1913.

GEO. OTIS SMITH,
Director.

Approved January 29, 1913.

SAMUEL ADAMS,

First Assistant Secretary of the Interior.

STATE OF CALIFORNIA ET AL.

Decided February 27, 1913.

SCHOOL INDEMNITY SELECTIONS—OIL LANDS—WITHDRAWAL.

No title is acquired under or by virtue of a school indemnity selection until the same has been approved by the Secretary of the Interior; and where the lands embraced in a selection are classified as oil lands and withdrawn under the provisions of the act of June 25, 1910, the Secretary is without authority to approve the selection in the face of such withdrawal; but it should be rejected, without prejudice to the right of the State to submit showing with a view to securing reclassification of the lands and to apply anew therefor in event of their restoration.

ADAMS, First Assistant Secretary:

October 17, 1911, counsel for the State of California and the Buena Vista Land and Development Company filed in the Department a petition, not verified, praying the Secretary of the Interior to exercise his supervisory power in behalf of the State of California and its transferee, the said company, and to issue to the Commissioner of the General Land Office a peremptory order directing that hearings in the matter of school land indemnity selections which had been theretofore ordered by his office and later indefinitely postponed, be had forthwith.

On or about March 12, 1912, the Honolulu Consolidated Oil Company filed in the Department its petition or motion for the cancellation of proffered school land indemnity selections and the clearing of the records of such applications, where the lands involved had been classified as oil in character and included in Presidential withdrawals pursuant to the act of June 25, 1910 (36 Stat., 847). This petition is supported by the affidavit of the president of the company which is corroborated by two witnesses, in order to show the company's interest. The concrete case called to the attention of the Department is that of proffered school land indemnity selection, serial 01915 (R. and R. 577), filed November 17, 1906, for the SW. $\frac{1}{4}$, Sec. 4, T. 32 S., R. 24 E., M. D. M., Visalia land district, California.

On application of the State and its transferee, the Buena Vista company, the Commissioner of the General Land Office, on March 31, 1910, directed that a hearing be had for the purpose of determining the character of the land. On October 15, 1910, the hearing not having been had, the Commissioner, for reasons deemed by him sufficient, indefinitely postponed the hearing in said case as well as hearings theretofore ordered relating to numerous other proffered selections for lands within the above-mentioned township.

It being represented that the matters involved in the two petitions pertained essentially to similar questions, the petitioners and all parties interested were advised that oral argument would be heard before the Department on April 4, 1912, on which date counsel repre-

senting the respective interests appeared and were heard. Prior to said hearing and on March 28, 1912, The Honolulu company had filed its brief in support of the petition pending. After the hearing counsel for the State and the Buena Vista company were granted opportunity to submit points and authority and the Honolulu company was permitted to file a reply brief. Upon the records of the land department and the papers and briefs filed by counsel, and the oral presentation made, the matters are submitted for decision.

The case as submitted involves the important question as to what procedure should be had in reaching a disposition of these proffered school land indemnity selections. The State and its transferee contend that the hearings heretofore ordered by the Commissioner and now standing indefinitely postponed should proceed with dispatch in order that all the facts and circumstances involved may be fully developed and disclosed for the information of the land department in making a proper disposition of the matter. On the other hand, the Honolulu oil company urges that the proffered selection above mentioned, viz., number 01915, and all others occupying a similar status, should be promptly rejected outright upon the present record without further proceedings in order that the face of the books and records of the land department may be cleared and freed of the notations of such applications.

The history of these lands is briefly as follows: In January, 1900, the lands in the township were alleged to be mineral in character and valuable for petroleum and were in effect withdrawn from agricultural appropriation. April 5, 1904, said lands were restored to agricultural entry. In 1906 the State of California made application to select said SW. $\frac{1}{4}$, Sec. 4, assigning as base therefor a tract theretofore included in the Stanislaus National Forest, and, at about the same time, numerous other applications for indemnity school lands were presented. Thereafter the tracts sought to be selected by the State, as is claimed, were purchased by and transferred to the Buena Vista company. September 14, 1908, the lands sought to be selected were temporarily withdrawn from all forms of agricultural entry by the Department pending examination and classification. June 22, 1909, the lands having been examined by the Geological Survey, were reported and classified as petroleum-bearing lands and this classification was approved by the Department. By departmental order of September 27, 1909, these lands with others were withdrawn from mineral disposition. By the Presidential order of July 2, 1910, pursuant to the act of June 25, 1910 (36 Stat., 847), the prior withdrawal was ratified, confirmed, and continued in full force and effect—

and subject to all of the provisions, limitations, exceptions, and conditions contained in the act of Congress entitled "An act to authorize the President of the

United States to make withdrawals of public lands in certain cases," approved June 25, 1910, there is hereby withdrawn from settlement, location, sale, or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum land belonging to the United States, all of those certain lands of the United States set forth and particularly described as follows.

On December 13, 1912, by further Presidential order pursuant to the authority of the same act, sections 2 to 18, inclusive, of said township 32 south, range 24 east, were included in Naval Petroleum Reserve Number 2. Said order is in part as follows:

It is hereby ordered that all lands included in the following list and heretofore forming a part of Petroleum Reserve Number 2, California Number 1, withdrawn on July 2, 1910, . . . shall hereafter, subject to valid existing rights, constitute Naval Petroleum Reserve Number 2 and shall be held for the exclusive use or benefit of the United States Navy, until this order is revoked by the President or by act of Congress. To this end and for this public purpose, the order of July 2, 1910, is modified and the withdrawal of that date is continued and extended in so far as it affects these lands.

It is clear that so long as the Presidential order of withdrawal stands covering and including these lands, the preferred school indemnity selections can proceed no farther and can not be approved, listed, or certified to the State. Such selections are not among those classes of claims provided for or saved in express terms by any of the provisions of the withdrawal act or of the orders issued thereunder. These lands were classified as oil lands. The withdrawal orders issued have followed such classification and are based thereon. It may be that if any of these tracts should be satisfactorily established to be non-oil in character, the department would feel impelled to call such fact to the attention of the President and recommend to him that the outstanding order of withdrawal be modified so as to eliminate such non-oil areas. Without such modification these selections must remain *in statu quo* or be finally rejected and the records cleared.

With reference to the hearings ordered it may be noted that the Buena Vista Company's applications and the Commissioner's orders for such hearing were long prior to the passage of the act of June 25, 1910, and the withdrawal thereunder. The later directions given to indefinitely postpone such hearing were issued after the Presidential withdrawal and on or about October 15, 1910.

The State and Buena Vista company contend that having complied with all the rules and regulations governing State selections and done all things required thereby they are entitled to an adjudication as of the date of proffering such completed selection. With this the Department cannot agree. These proffered selections have not yet received the approval of the Secretary of the Interior. Until that approval is given the selections are not completed and are in reality only pending applications to select.

The selectors oppose this position. They argue that sections 2275 and 2276 as amended by the act of February 28, 1891 (26 Stat., 796), do not require the approval of the Secretary, and that such sections wholly supercede and displace the requirements of the act of March 3, 1853 (10 Stat., 257).

The act of February 28, 1891, is a general adjustment act and provides for a complete filling of the school grant and the ultimate adjustment of the State's rights thereunder. The State of California derives its grant of school lands through sections 6 and 7 of said act of March 3, 1853. By section 7 it is provided that where any preemption settlement shall be made upon any section 16 or 36 before survey, or where said sections may be reserved for public uses or taken by private claims

other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of Congress approved on the twentieth day of May, eighteen hundred and twenty-six (4 Stat., 179), . . . and which shall be subject to approval by the Secretary of the Interior.

Said act of May 20, 1826, appropriated lands for the support of schools in certain townships and fractional townships not before provided for, and by section 2 thereof it is prescribed that such tracts of land shall be *selected by the Secretary of the Treasury* out of any unappropriated public lands within the land district.

By the act of February 26, 1859 (11 Stat., 385), general provision is made for supplying deficiencies in school grants. That act appropriates other lands of like quantity in lieu of such as may be patented by preemptors, and also appropriates and compensates for deficiencies where sections 16 and 36 are fractional in quantity or are wanting by reason of the township being fractional or from any natural cause. It is provided that the lands so appropriated "shall be selected and appropriated in accord with the principles of adjustment and provisions of the act" of May 20, 1826. This act is the basis of original sections 2275 and 2276 of the Revised Statutes.

The grant made by the act of 1853 to the State of California was directed to be construed in a certain manner by section 6 of the act of July 23, 1866 (14 Stat., 218, 220).

By the act of February 28, 1891 (26 Stat., 796), sections 2275 and 2276 were amended. Section 2275 reads in part:

Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and

may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said section. . . . And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservation, and thereupon the State or Territory shall be entitled to select indemnity lands.

Section 2276 is in part as follows:

That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur.

From the foregoing it will be observed that the act of 1826, *supra*, provided that the Secretary of the Treasury should make the school selections. The California act of 1853 provides that the selections are to be subject to the approval of the Secretary of the Interior. The later acts cited do not by their express terms or by implication authorize indemnity selections otherwise than subject to the approval of the Secretary of the Interior.

The Supreme Court of California in *Roberts v. Gebhart* (104 Cal., 68; 37 Pac., 782), with reference to school indemnity, expressly held as follows:

In the first place, the selection made by the State upon application of the plaintiff was not approved by the Secretary of the Interior, and therefore such attempted selection did not give to the State any legal or equitable right to the land therein described. . . . It is the consent of the United States as manifested by the approval of the Secretary of the Interior, which gives legal efficacy to the application or selection made by the State, and without such approval neither the State nor its grantee is in a position to call in question any future disposition which the United States may make of the land embraced in the attempted selection.

In another case, *Buhne v. Chism* (48 Cal., 467), arising under a selection of land in satisfaction of the grant to the State for the use of a seminary (Sec. 12, act March 3, 1853) the Supreme Court said:

We think the approval of the Secretary of the Interior was essential to a valid selection and location by the State and that it was incumbent upon the plaintiff to show affirmatively that he (the Secretary) had approved it.

It has been the uniform practice for the Secretary of the Interior to approve school indemnity selections.

In the case of *Swank v. State of California* (27 L. D., 411) it was held (syllabus):

Prior to the approval of a school indemnity selection the land included therein, if mineral in character, is open to exploration and purchase under the mining laws of the United States.

This holding was reiterated in the case of *McQuiddy v. State of California* (29 L. D., 181).

In the case of *Kinkade v. State of California* (39 L. D., 491) it was held (syllabus):

No title is acquired under or by virtue of a school indemnity selection until the same has been duly approved and certified, and prior thereto a discovery that the land is mineral will defeat the selection.

The Department is accordingly of opinion that the school indemnity selections here involved are subject to rejection unless the lands covered thereby are specifically shown to be nonmineral in character.

The Buena Vista company's contention that the Commissioner's letter of June 1, 1907, returning certain State indemnity school land lists "for allowance," constituted an approval of such selections is without merit. This contention is inconsistent with the present plea of the selectors for an immediate hearing with respect to these lands.

In the case of *State of California et al.* (40 L. D., 301), involving a school indemnity selection, the Department held that, in face of the executive withdrawal, an amendment by the substitution of new base for the proposed selection could not be allowed. It was therein held:

As this land had been classified as oil land, and was reserved by executive order, it ceased to be subject to disposal under the agricultural land laws.

In a case somewhat analogous to that here under consideration, *Southern Pacific R. R. Co.* (41 L. D., 264), where lands within the railroad company's primary limits were applied for, the following language was used:

The Secretary was without power to patent the land to the company, for its mineral character excepts it from operation of the grant, and such mineral character is at least *prima facie* established by its classification as oil-bearing land. Nothing herein will preclude the company, upon a proper showing, from right to ask a hearing on proper notice to show error in classification of the land as mineral.

In view of all the circumstances, and by reason of the later executive withdrawals, the Department is of opinion that the orders for hearing issued in March, 1910, should not be revived or further pursued in regard to these proffered selections. Moreover, since the President has, on account of their mineral character, withdrawn these lands from disposition, it is evident that the Secretary has no authority to approve the selections, and they must therefore be rejected. If the withdrawal shall be canceled, the State may apply anew for the lands if it is so advised. However, counsel seem to admit that the lands are in fact mineral.

The State selections involved will be canceled. This is without prejudice to the right in the State to submit such showing as to non-

mineral character of the lands involved, as a fact, as may warrant further investigation to the end that the existing classification may be set aside and recommendation, based thereon, made to the President to relieve the lands from the existing withdrawal.

STATE OF CALIFORNIA ET AL.

Motion for rehearing of departmental decision of February 27, 1913, 41 L. D., 592, denied by Assistant Secretary Laylin April 23, 1913.

HANNAH MILLER HARJU.

Decided March 3, 1913.

HOMESTEAD—DEATH OF ENTRYMAN—RIGHT OF WIDOW WHO REMARRIES ALIEN.

Where the widow of a deceased homesteader is remarried to an alien, without having submitted proof upon her deceased husband's entry, she thereby, by reason of loss of citizenship, becomes disqualified to complete such entry, all rights under which thereupon descend to his heirs.

LAYLIN, *Assistant Secretary*:

Appeal is filed by Hannah Miller Harju from decision of October 14, 1912, of the Commissioner of the General Land Office, requiring her to furnish evidence of the citizenship of her present husband, Alec Harju, in completion of her final proof submitted July 11, 1912, on the homestead entry made August 30, 1906, by her former husband, William Miller, now deceased, for NW. $\frac{1}{4}$, Sec. 28, T. 134 N., R. 74 W., 5 P. M., Bismarck, North Dakota, land district.

Said William Miller died December 19, 1906, and his widow, this claimant, remarried in November, 1908. It appears her first husband was native born, and that he left two minor children. The claimant's second husband is not a citizen of the United States.

Under the homestead laws, persons submitting proof are not entitled to patent unless "at that time citizens of the United States." Section 3 of the act of March 2, 1907 (34 Stat., 1228), provides "that any American woman who marries a foreigner shall take the nationality of her husband."

In view of the foregoing provisions, this claimant is not entitled to patent on the proof submitted. She being incompetent, the entryman's heirs may succeed to the title. Phillippina Adams *et al.* (40 L. D., 625). This case is accordingly remanded for further adjudication in accordance with that decision, in the interests of the entryman's heirs.

WESTERN PACIFIC RY. CO.

Memorandum of March 5, 1913.

RIGHT OF WAY—STATION GROUNDS—ACT OF MARCH 3, 1875.

Section 1 of the act of March 3, 1875, does not make an absolute grant of twenty acres of public lands for station purposes for each ten miles of road, regardless of necessity therefor; but the measure of the right thereby granted is the reasonable necessities of the road, not to exceed either twenty acres to each station or one station for each ten miles.

SHOWING TO SUPPORT APPLICATION FOR STATION GROUNDS.

In making a showing to support an application for station grounds under the act of March 3, 1875, the railroad company is not limited to immediate necessities but may include the reasonable demands of the future based upon existing probabilities.

PURPOSES FOR WHICH STATION GROUNDS MAY BE USED.

The use of station grounds acquired under the act of March 3, 1875, is not restricted to the uses specifically mentioned in the act, but may, upon a clear and definite showing of necessity therefor, include any use legitimate to the general business of railroading as carried on by railroad companies generally in serving the public.

STATION GROUNDS—LANDS DESIRED FOR CONSTRUCTION MATERIAL.

The act of March 3, 1875, does not contemplate or authorize the inclusion within an application for station purposes of lands desired merely for the purpose of taking therefrom earth and other material to be used in the construction or maintenance of the road.

ADAMS, *First Assistant Secretary*:

By the act of March 3, 1875 (18 Stat., 482), "a right of way over the public lands is granted generally to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same."

The grant made by this act is "to the extent of 100 feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad." The particular grant for station and other purposes is "not to exceed in amount 20 acres for each station, to the extent of one station for each ten miles of its road."

Because of the limit of the grant for station purposes to an amount not to exceed twenty acres for each station, it has been general for railroad companies to apply for approximately that amount of land for each station without respect to the actual necessities of the case. This matter was considered in departmental decision of January 19, 1912 (Western Pacific Railway Co., 40 L. D., 411), wherein it was held that (syllabus):

Section 1 of the act of March 3, 1875, does not make an absolute grant of twenty acres of public lands for station purposes for each ten miles of road.

regardless of necessity therefor; but the measure of the right thereby granted is the reasonable necessities of the road, not to exceed either twenty acres to each station or one station for each ten miles.

On motion for rehearing of departmental decision of October 18, 1912, not reported, respecting the station grounds applied for by the Western Pacific Railway Company, covering twenty acres in Sec. 10, T. 35 N., R. 32 E., Carson City, Nevada, land district, the station being known as Jungo, I have considered the question as to the nature of the showing which should be required as to the necessity for lands applied for by railroad companies, under the act of March 3, 1875, for station and other purposes, and while I have not the time to formulate an opinion respecting these matters I have thought it advisable to file this memorandum containing my views respecting this matter.

Where lands are sought and obtained under this act for station and other purposes, the use of the property obtained is by the law restricted to the legitimate uses of the railroad for the purposes of operation and maintenance of the property as an incident to the railroad. It follows, as a consequence, as it is not infrequent that the railroad station often becomes a nucleus for a new town or settlement, that lands are reserved for railroad uses that are not needed therefor and are needed for townsite purposes but prevented by reason of their reservation for station purposes. This condition often forces the railroad company to make improper use of its right of way, for townsite purposes, with possible injury to others, unless Congress, as it has in some instances, confirms the improper disposals by the railroad company, or proper respect for the limitations of the grant separates the town from the railroad, often a very undesirable condition.

Respecting the uses that may support the railroad company's application, it is, of course, not limited to the immediate necessities but should include only the reasonable demands of the future, based upon existing probabilities and not upon fanciful speculations. The grounds needed for station buildings, depots, machine shops, side tracks, turnouts, and water stations, are specifically mentioned in the statute, but, in my opinion, the uses are not restricted to those particularly named. Such use may embrace cattle yards that are actually built and maintained as such, convenient to the handling of this line of business, and, as before stated, any use legitimate to the general business of railroading as carried on by railroad companies generally in serving the public. It may be necessary, also, to use a portion of the ground in a manner so as to protect the actual line of railroad, its buildings and other structures for railroad use, or a change in the actual conformation of the ground immediately adjoining the general right of way may necessitate use of a tract so as

to make the ground used for station purposes available in serving the public as its use is designed.

In the matter of uses, however, other than those particularly named in the statute, the showing as to the necessity therefor should be definite and convincing. I have been told that in some instances ground is included in the application for station purposes merely to secure earth and other material either for construction of its road or its subsequent maintenance. As the act grants the right "to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad," I am of opinion that this is the full extent of the grant for such purposes, and that the inclusion of lands within the application for station grounds, where desired merely for these purposes or for any other purpose not within the class as above described, is improper and to such extent the application should be denied. In my opinion, applications for rights of way for station grounds should be adjudicated within the lines herein named.

HERREN v. HICKS.

Decided March 6, 1913.

DESERT ENTRY—ANNUAL PROOF—IMPROVEMENTS.

A desert land entryman is not entitled, in making annual proof, to credit for improvements placed upon the land by a former entryman.

EXPENDITURES THAT MAY BE CREDITED ON ANNUAL PROOFS.

No expenditures can be credited on annual proofs upon a desert land entry unless made on account of that particular entry; and expenditures once credited can not be again applied.

ADAMS, *First Assistant Secretary*:

Effie M. Hicks has filed a motion for rehearing of departmental decision, dated November 11, 1912, reversing the action of the Commissioner of the General Land Office and cancelling her desert land entry, made on August 16, 1909, for the N. $\frac{1}{2}$, Sec. 35, T. 24 S., R. 9 W., N. M. P. M., Las Cruces, New Mexico, land district.

In its said decision the Department held:

Considering the expenditures herein, the testimony in the case clearly shows that the improvements on this land at the date of the submission of proof were of little or no permanent reclaiming value and of value less than \$320, the amount required by the desert land law to have been expended during that year, and that such proof was false in showing 10 acres cleared and broken. The contest is, therefore, sustained and the entry will be canceled.

The charge made in the affidavit of contest was as follows:

that said Effie M. Hicks, contestee, has wholly failed to make the requisite annual expenditure required by law during the first year after said entry, that

is, after the 16th day of August, 1909, and before the 16th day of August, 1910, and that said Effie M. Hicks, contestee, has not expended to exceed twenty dollars in improvements upon said land since said entry to this time; that the statements of expenditures contained in the first yearly proofs heretofore filed by said Effie M. Hicks in the land department are false and misleading and said Effie M. Hicks has not made the expenditures or improvements therein stated upon said land.

While the latter part of the charge is sufficiently broad to have warranted the introduction of testimony with reference to the value and extent of the improvements referred to in the claimant's first annual proofs, it is obvious, from the record, that both parties to the contest regarded the issues of the case to be, first, that the claimant did not make the expenditures or improvements upon the land; second, that said expenditures and improvements were made prior to the date of the entry. The contestant objected to the introduction of any testimony as to the value of the improvements upon the ground that it was "incompetent, irrelevant and immaterial." The record clearly shows that all of the improvements relied upon by the claimant in her first annual proof were placed on the land by a former desert land entryman and the only valuation placed thereon is the statement of one witness that they were worth "over three hundred dollars."

The testimony shows that the claimant, relying upon the advice of parties from whom she had purchased the relinquishment of the former entry and on certain departmental decisions (*Holcomb v. Scott*, 33 L. D., 287, and *Holcomb v. Williams*, 33 L. D., 547), submitted first annual proof on August 20, 1910; on September 20, 1910, one Miller, a friend of the present contestant, instituted a contest in which the validity of the proof was attacked; the claimant, upon the advice of counsel, paid Miller \$100 to dismiss his contest, and began preparations to place other improvements on the tract, which are shown to have been prosecuted with reasonable diligence, and proof of her expenditures in that behalf is now with the record. In the meantime, this contest was filed.

In its decision of November 11, 1912, the Department, citing *Heflin v. Schnare* (40 L. D., 261), intimated that the cases of *Holcomb v. Scott* and *Holcomb v. Williams*, *supra*, were to be regarded as authority that a desert land claimant was entitled to credit for permanent improvements, tending to effect reclamation, placed upon the land by a former entryman. Thus, the charge of the contest affidavit and the testimony offered in support thereof, having failed to put in issue the value and extent of the improvements, the fact that they were placed on the land prior to entry, did not, under the construction placed upon the law, warrant the action taken by the Department on November 11, 1912. The decision is, accordingly, vacated and the contest dismissed.

Upon reconsideration of the entire subject, the Department is convinced that, for the purpose of annual proof of yearly expenditures required by the desert land law, credit can not be given for improvements placed upon the land by a former entryman. Not only does the law expressly require that a claimant "shall file during each year with the register, proof, . . . that the full sum of one dollar per acre has been expended in such necessary improvements *during such year*," etc., but it provides a method, through assignment of the entry, by which one who purchases improvements placed upon the land with a view to its reclamation may obtain the benefit thereof. The assignee of a desert land entry, however, acquires not only the credits but the burdens of his assignor, and the time within which he may show compliance with law runs from the date of the entry, not the date of the assignment. The law can not be evaded, its benefits secured and its burdens escaped, by the making of a new entry. As was held in said decision of November 11, 1912, if expenditures made under an entry could be credited upon a succeeding entry, it would be possible, upon expenditures of but \$1 per acre, to hold such land out of the market indefinitely, thus circumventing the plain requirement of the statute. Hereafter, therefore, no expenditures, except those made on account of the entry, can be credited on annual proofs, and expenditures once credited can not be again applied, and decisions in conflict herewith will be no longer followed.

The claimant is allowed thirty days from receipt of a copy of this decision within which to take steps looking to the submission of proof that she has made the expenditures required by law in connection with her entry, if she has not already done so.

PHILLIPS v. GRAY.

Decided March 6, 1913.

DESERT ENTRY—EXTENSION OF TIME—PENDING CONTEST.

A pending contest against a desert land entry will not prevent the allowance of an application for extension of time under the act of March 28, 1908, where the application is based upon facts which bring the case within the provisions of said act.

LAYLIN, *Assistant Secretary*:

Mary Gray, assignee of George H. Williamson, has appealed from decision of November 2, 1911, by the Commissioner of the General Land Office, holding for cancellation desert land entry made January 24, 1905, by George H. Williamson, for the SE. $\frac{1}{4}$ Sec. 7, T. 4 S., R. 7

E., B. M., Boise, Idaho, land district, upon the contest of Frank R. Phillips. The entry was assigned to Gray on May 10, 1906.

The charges were that the entrywoman has not made final proof; that she owns no water right and has not reclaimed the land, although an extension of time was granted, which has expired.

The entrywoman had applied for extension of time for three years, under the act of March 28, 1908 (35 Stat., 52), which was allowed by the Commissioner for two years, which expired January 24, 1911. This contest was filed March 27, 1911, notice issued March 30, 1911, and service thereof was made April 8, 1911.

The entrywoman testified at the hearing that she did not receive the notice sent to her address by the local officers notifying her that her former application for extension of time had been allowed for only two years instead of three years, as requested by her; that she promptly filed application for further extension when she learned that the former extension had expired; that she did not know of the contest until she appeared at the land office and filed her present application for an extension of time. It further appears from the evidence that she paid \$3,500 in cash for a water right from the Great Western Beet Sugar Company, and also has placed about \$500 worth of improvements upon the land. It is shown that the said company is a defunct organization, and it is urged upon the part of the contestant that the so-called water right is worthless. It appears, however, that a company has been formed, composed of persons who had paid money to the first mentioned company, for the purpose of completing the project and furnishing water to such water right holders. The Department has had occasion to consider similar cases under this project and in one such (*Hoobler v. Treffry*, 39 L. D., 557) it was stated:

It satisfactorily appears that this entryman's assignee acted in good faith in undertaking to comply with the desert land law, expending a large amount of money in reliance upon a system of irrigation approved as and reputed to be adequate, and only failing because of reckless if not criminal mismanagement of the company by its principal officer. Until water was secured, cultivation of the land would be useless, and failure to cultivate under the circumstances shown is not evidence of bad faith nor such fault on the part of the assignee herein as should exempt him from the remedial operation of this act. The contention made that he did not make expenditure in good faith "for a valid water right" contains no force, as the failure to receive water under his purchase was not due to invalidity of his purchased right but to mismanagement of the company's affairs, rendering it unable to fulfill its contract to furnish water under such purchase.

The facts specified in said act as basing and entitling to extension thereunder are shown herein to the satisfaction of the Commissioner, as provided in the act, and his finding is fully warranted by the evidence. The assignee is entitled to extension accordingly, and the contest was thereby foreclosed and properly dismissed.

In the present case, the local officers and the Commissioner have taken the view that, inasmuch as the contest was filed before the present application for extension was filed, the application for extension can not be considered. The Department does not concur in this view. Aside from the question of notice concerning the former extension of time and the question as to knowledge of the contest prior to the filing of the present application, it is believed that, if it be found that the facts merit further extension of time, the contest does not preclude the Department from granting such extension. In the said case of *Hoobler v. Treffry*, *supra*, it was held (syllabus):

The filing of a contest against a desert land entry during the pendency of an application for extension of time under the act of March 28, 1908, will not prevent the allowance of such application where the contest affidavit does not charge facts tending to overcome the *prima facie* showing of right to the extension set forth in the application.

In the case under consideration, the contest affidavit was filed prior to the filing of the application for extension of time but service of notice upon the contestee was after the application for extension of time was filed. However, this matter of precedence is unimportant. The Department has held that final proof submitted on a homestead entry after expiration of the statutory period may be accepted and submitted to the Board of Equitable Adjudication, and that a pending contest does not in any way interfere with such action. *McCraney v. Heirs of Hayes* (33 L. D., 21). The present claim for relief is even stronger, based, as it is, upon statutory right, provided the facts bring the case within the provisions of the statute authorizing extension of time. The fact that extension was granted for two years indicates that, as an original cause, the reasons assigned were sufficient. The same reasons are again urged, namely, that the failure of the said water company has prevented the entrywoman from procuring water for reclaiming the land. But it is represented that there is a fair prospect for securing water through another company which has been formed to complete and operate the same project.

The good faith of the entrywoman is not questioned nor the alleged expenditures denied. The application which requests extension for one year will be allowed. In case further extension should be found necessary, application therefor should be made under the provisions of the recent act of April 30, 1912 (Public, No. 143).

The decision appealed from is reversed and the contest dismissed.

SMITH v. WOODFORD.*Decided March 6, 1913.***RELINQUISHMENT FILED PENDING CONTEST—RIGHT OF CONTESTANT.**

One who files an application to enter, relying upon a relinquishment filed concurrently therewith but executed sixteen months before by a former entryman for the same land, and without having made any inquiry at the local office of the land district in which the land is located to ascertain whether any contest was pending against such entry, does not thereby acquire any such right as will defeat the right of the contestant under an intervening well-founded contest filed in good faith, notwithstanding the relinquishment was in no wise the result of the contest.

ADAMS, First Assistant Secretary:

Appeal is filed by Sanna N. Woodford from decision of April 2, 1912, of the Commissioner of the General Land Office, affirming the action of the local officers and rejecting the application filed by said Woodford July 1, 1911, to make desert land entry for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 31, T. 9 N., R. 62 W., Denver, Colorado, land district, as in exercise of a claimed preference right as successful contestant against a prior homestead entry for said lands made April 9, 1909, by Charles Stanley Bixler.

Woodford's contest affidavit filed June 6, 1911, alleged that Bixler never established residence on said lands or made any improvement or cultivation thereof. On June 10, 1911, Bixler's relinquishment, executed February 5, 1910, was filed, with application by Edward J. Smith to make homestead entry for the lands. In accordance with the second paragraph of the circular of September 15, 1910 (39 L. D., 217), Smith's application was suspended, Woodford was notified of her presumptive right, and hearing was ordered upon the filing of her said application. Hearing was had, at which both parties appeared and presented testimony, upon consideration of which the finding of fact, concurred in by the local officers and the Commissioner, was made that neither Bixler nor Smith had any knowledge, at the time said relinquishment was filed, of Woodford's contest, upon which finding alone it was held, by the local officers and the Commissioner, that Woodford's application should be rejected and Smith's allowed, following the concluding instruction in said paragraph of said circular that: "If it satisfactorily appear from the testimony that the relinquishment was not the result of the contest, the intermediate applicant will prevail."

The Department has carefully examined the record and considered the same. The testimony not only supports the finding of fact stated, that neither Bixler, the former entryman, nor Smith, the present homestead applicant filing Bixler's relinquishment, had any knowledge in fact, at the time said relinquishment was filed, of Woodford's contest, but shows further that Bixler, as he himself admits, never es-

tablished residence upon or improved or cultivated said lands, and that he executed his relinquishment of his entry February 5, 1910, in order to save his homestead right, and gave same to one Selby to file for him. Selby, however, apparently without Bixler's knowledge, attempted for a considerable time to sell the relinquishment and finally sold it to one McGinnis who sold it to Orr who sold it to Smith June 7, 1911, for \$100, upon the condition that Smith should make entry. Bixler says he never received any consideration for his relinquishment and had no interest in the lands after executing same. Smith appears to have made no inquiry at the local office prior to filing said relinquishment and his application as to whether there were any contests of record against Bixler's entry.

An applicant who files his application relying upon a relinquishment filed concurrently therewith but executed sixteen months before by a former entryman for the same lands, and without having made any inquiry at the local office of the land district in which said lands are located as to whether there are any contests against such entry, is grossly negligent and has himself only to blame if a well-founded contest has been filed. Woodford had a good and sufficient affidavit of contest of record when Smith purchased and when he filed Bixler's relinquishment, and the testimony at the hearing showed that such contest was well founded. Furthermore, it was common knowledge in the vicinity of the lands that Bixler had never complied with the law under his entry in any respect. Smith is chargeable with knowledge at least that the entry had long been subject to contest, and under the circumstances shown had presumptive knowledge of Woodford's contest. Be this as it may, Woodford, accepting the invitation of the Government as extended by the second section of the act of May 14, 1880 (21 Stat., 140), in the pursuit of a preference right to this tract, had, prior to the filing of Bixler's relinquishment, filed a good and sufficient affidavit of contest and the showing in this record clearly sustains the allegations of said contest. How, then, can he be denied the fruits thereof? True, the act says: "In all cases where any person has contested, paid the land office fees, and procured the cancellation of any preemption, homestead, or timber-culture entry, . . . shall be allowed thirty days from date of such notice to enter said land." Woodford was not put to any expense in the cancellation of Bixler's entry further than the filing of his affidavit of contest, but the case here presented is one of confession, the charge being admitted. True, at the hearing afterwards held it was adjudged that the filing of the relinquishment was without knowledge of the contest, and under the last sentence of paragraph 2 of the regulations of September 15, 1910, *supra*, on such showing the intermediate applicant prevails. It is not believed, however, that this part of the regulations can be applied under the

facts in this case, for if they are so applied they violate the rights of the contestant under the statute.

The question of the modification of these regulations will receive early consideration.

For the reasons hereinbefore given, I am clearly of opinion that Woodford secured a preference right of entry in this tract under the act of May 14, 1880, *supra*, by reason of his contest of Bixler's entry, and that his application duly presented in furtherance of such right, must prevail. The intermediate application of Smith must, therefore, be rejected. The decision appealed from is reversed.

SMITH v. WOODFORD.

Motion for rehearsing of departmental decision of March 6, 1913, 41 L. D., 606, denied April 28, 1913, by Assistant Secretary Laylin.

CHARLES S. ALBRIGHT.

Decided March 6, 1913.

OKLAHOMA PASTURE LANDS—EXTENSION OF PAYMENTS.

Payment of the five per cent extension charge under the acts of March 11, 1908, and February 18, 1909, on an instalment of the purchase price of Oklahoma pasture lands, operates to extend only the particular instalment upon which such charge is paid, and does not operate to extend any other payments not yet due and upon which no extension charge has been computed or paid.

RATE OF INTEREST PRIOR TO ACT OF MARCH 26, 1910.

Instalments not paid and not extended under said acts continue after maturity, and extended instalments continue after the year of extension, and prior to March 26, 1910, to draw interest at the rate of six per cent per annum fixed in the original purchase act of June 28, 1906, up to the date of the act of March 26, 1910, and thereafter at the rate of five per cent per annum fixed by the latter act.

RATE OF INTEREST AFTER THE ACT OF MARCH 26, 1910.

Instalments falling due originally, or as extended under the acts of March 11, 1908, and February 18, 1909, after March 26, 1910, draw interest at the rate of five per cent per annum from the date they fall due until they again become due as extended by the act of March 26, 1910.

EXTENSIONS AND INTEREST CHARGES UNDER ACT OF APRIL 27, 1912.

Instalments falling due as extended by the act of March 26, 1910, together with the interest thereon, are, under the act of April 27, 1912, to be subdivided into two parts each, at the dates they severally become due, one of such parts falling due one year from the date of the first subdivision and the remainder successively one each year thereafter until all are paid, with interest thereon at the rate of four per cent per annum.

LAYLIN, *Assistant Secretary*:

The Department has considered motion for rehearing filed in the above entitled cause wherein decision was rendered July 15, 1912

(not reported), remanding said cause for action as therein directed with reference to the deferred payments under the purchase made by Charles S. Albright, November 14, 1906, under the act of June 28, 1906 (34 Stat., 550), of certain described lands in the Lawton, Oklahoma, land district.

Said decision was rendered on appeal from the decision of the Commissioner of the General Land Office holding that the benefit of the extension act of March 26, 1910 (36 Stat., 265), with reference to such purchases, was dependent in this case upon the payment by said Albright, required of him in said Commissioner's decision, of \$310.81 as extension charges under the prior extension acts of March 11, 1908 (35 Stat., 41), and February 18, 1909 (35 Stat., 636). The Department in its said decision held that Albright was not entitled to the benefit of said extension acts of March 11, 1908, and February 19, 1909, as to deferred payments falling due prior to March 26, 1910, on which no payment had been made on account of extension under those acts; that there was a deficiency of \$5.45 in the payment made by him on account of extension of the first deferred payment; and that all of said deferred payments were subject, as therein stated, to extension under said act of March 26, 1910, and the act of April 27, 1912 (37 Stat., 91); and payment of said deficiency of \$5.45 was required within thirty days, under penalty of cancellation of the entry if not so paid.

Subsequent examination of the case in the General Land Office disclosed that Albright had on July 26, 1911, conformed to the Commissioner's requirements and paid said \$310.81, which included said \$5.45; and the Department's decision was modified September 9, 1912, accordingly by revoking said requirement as to payment of said \$5.45, and directing that the remainder of said sum of \$310.81, or \$305.36, be credited to Albright in connection with the next payment falling due on his entry.

It is urged that the computation of interest herein is not in accordance with said extension acts, that the effect of said acts of March 11, 1908, and February 18, 1909, was to extend "all deferred payments" upon the payment of 5 per cent of the amount of the first deferred payment, only, each year from the date same originally fell due; the other deferred payments being thereby extended, as contended, without payment thereon of any extension charge and without interest either from date of the purchase or after maturity according to the original purchase act; also, that extension under said act of April 27, 1912, is not from date of that act (according to instructions issued thereunder, 41 L. D., 80), but from one year after the date in the year 1912 subsequent to April 27, 1912, when a payment would fall due according to prior laws.

This first mentioned contention is based particularly upon the language used in said act of March 11, 1908, that "the time within which all payments required by," and in said act of February 18, 1909, that "the time within which all unpaid payments which have heretofore or may hereafter become due and payable" under said purchase act of June 28, 1906, and the act of June 5, 1906 (34 Stat., 213), "be and the same is hereby postponed and extended for one year from the date on which such payments are now by law required to be made: *Provided*, That as a condition precedent to said extension in each case the settler shall pay . . . four per centum on the amount of such deferred payments where such settler had no preference right, and five per centum on the amount of the deferred payment where such settler was given a preference right."

Reference is also made to said act of March 26, 1910, providing that:

All payments heretofore due and extended, and the payments due or to become due during the year nineteen hundred and ten . . . are hereby postponed and extended as follows: one of said payments shall be made in nineteen hundred and eleven at the time when a payment would become due under existing law or one year after such payment became due in nineteen hundred and ten, and the other payments shall be made annually thereafter.

The only question here presented is as to the legal construction of these several acts with reference to the extension of said deferred payments. The construction urged by Albright is clearly not warranted. The acts of March 11, 1908, and February 18, 1909, are not operative of their own force to extend any payment but only operate on performance by the purchaser of the condition that he pay 5 per centum of the amount of a deferred payment due. Upon making such per centum payment, extension for one year of the amount on which it is computed follows, by operation of said acts, but not extension of other deferred payments not yet due and upon which no per centum has been paid for extending same. Such per centum payment is in the nature of consideration, in lieu of interest, for forbearance and deferment of a payment of money due. The manifest intendment of said extension acts of 1908 and 1909 was to make each deferred payment severally and not all jointly subject to extension, if not paid when due, by paying in lieu of further interest thereon the stated per centum of such unpaid matured debt. There was no curtailment of the contract rights and obligations fixed at date of purchase. Each deferred payment was left to mature according to the original purchase act providing for interest thereon at 6 per centum per annum except that interest should not accrue during an extension period. That interest at that rate after maturity was contemplated is evident from the express provision of said act of 1909 that the per centum charge fixed therein for one

year extension after maturity of an unpaid deferred payment should be in lieu of interest for the year of such extension. If a deferred payment be not paid when due as originally matured or as matured on extension, or same be not extended by prepayment of such per centum charge, the original interest rate of 6 per centum per annum would be properly accruable and chargeable on such payment according to the terms of the purchase. There is no warrant in the law for granting an extension, as contended by Albright, of three deferred payments, after the first, without payment thereon of any per centum charge whatever, nor any legal warrant for not charging interest on such deferred payments, the same as on the first deferred payment, of the purchase money, from the date of the purchase, according to the express provisions of said original act under which the purchase was made. These acts are not to be construed in the interests solely of the purchasers. The Indians whose lands these were and for whom the Government was acting in making these sales only as trustee are parties equally in interest with the purchasers so far as these payments of the purchase money are concerned, and the provisions of law allowing interest on deferred purchase payments and extension of such payments upon payment of the stated per centum charge must be construed, with the original purchase act, strictly under the legal rules of construction. There are no equities to be resolved, under the Department's general powers, in favor of one or the other of these parties in real interest as to the money payments involved. It is the clear intent of Congress that the purchasers of these lands shall pay interest from date of their purchase up to maturity and interest or the stated charge for an extension in lieu of interest after maturity upon each and all of the deferred payments. If a purchaser has not taken advantage of the extension acts of 1908 and 1909, allowing the lower charge for forbearance of his matured debt, in any year, he is properly chargeable with interest at the rate originally fixed of 6 per centum per annum up to the passage of the act of March 26, 1910, and thereafter in accordance with the provisions of that act, which affected to reduce the interest rate only after maturity of the several deferred payments under the original purchase act and the extension acts of 1908 and 1909, as held in the Department's former decision in this case and in the case of Henry W. Farrant (41 L. D., 267).

Said act of April 27, 1912, provides for division of deferred payments and for further extension thereof "from the date on which each payment so divided becomes due under existing law" and that: one of the parts into which each deferred annual payment is subdivided shall be paid annually thereafter . . . *Provided*, That all interest due on such deferred payments on the date of the passage and approval of this act shall be

added to the principal, become a part thereof, and together with all deferred payments, bear interest at the rate of four per centum per annum until paid.

This act does not purport to curtail the time of deferred payments not then due or to change the rate of interest thereon prior to the time they would become due under prior existing law. The act specifically extends the time of "each payment" from the date it becomes due "under existing law." It has reference particularly to the situation as existing under prior laws wherein all four deferred payments were, by the act of March 26, 1910, extended specifically and expressly to mature in the years 1911, 1912, 1913, and 1914, respectively, and contemplates further that if the first deferred payment so maturing in the year 1911 was not made, thereby making same due at the date of the passage of this act, April 27, 1912, such unpaid matured debt should be accordingly as provided therein, compounded to that date and extended in accordance with the other provisions of that act, viz., one-half thereof maturing in that year one year from the date in the year 1911 when it was due under said act of March 26, 1910, as above stated, and one-half thereof maturing one year later, with interest on each part from April 27, 1912, at the rate of 4 per centum per annum. The other deferred payments maturing, under said act of March 26, 1910, as stated, in the years 1912, 1913, and 1914, respectively, are left unaffected by said act of April 27, 1912, prior to the dates they respectively so mature under the former act, and up to those several dates interest properly accrues at the rate of 5 per centum per annum, as fixed by said act of March 26, 1910, which is added to the principal then due and the sum divided into two parts, maturing thereafter in order following maturity of the preceding divided payment, with interest from the date of such division at the rate of 4 per centum per annum, in strict accordance with the provisions of said act of April 27, 1912.

In accordance with the foregoing, said \$305.36 paid by Albright July 26, 1911, was not then due from him, as all deferred payments under his purchase were extended by said act of March 26, 1910, the first deferred payment falling due November 14, 1911.

He is entitled accordingly to a credit upon the amount then due, \$2,239.99, of said sum of \$305.36 with interest thereon at the rate of 5 per centum from July 26, to November 14, 1911, amounting to \$309.94, leaving a balance of \$1,930.05. Computing 5 per centum per annum on this balance from that date to April 27, 1912, the same amounted on the latter date to \$1,973.74, which should be divided, in accordance with the act of that date, into two parts, one of which should be considered as having fallen due November 14, 1912, and the other as falling due November 14, 1913, with interest from April 27, 1912, at the rate of 4 per centum per annum, as provided in that act.

The second and third deferred payments bear interest at the rate of 6 per centum per annum from date of purchase to November 14, 1908, and November 14, 1909, respectively, when originally maturing, and the amounts thereof at that rate from those dates to March 26, 1910, and the fourth deferred payment at that rate from date of purchase to November 14, 1910; all three payments bearing interest at the rate of 5 per centum per annum from November 14, 1908, November 14, 1909, and November 14, 1910, respectively, when originally maturing, to the corresponding date in the years 1912, 1913, and 1914, to which respectively extended by the act of March 26, 1910; and thereafter, upon subdivision at that time in accordance with said act of April 27, 1912, such subdivided parts will bear interest at the rate of 4 per centum per annum from the date of such subdivision.

The decision of July 15, 1912, herein, and the instructions of June 8, 1912 (41 L. D., 80), are modified as to the effect of said act of April 27, 1912, in accordance with the foregoing, and the case is remanded for action as herein directed.

RECLAMATION—YUMA PROJECT—PAYMENT EXTENDED.

ORDER.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 6, 1913.

In pursuance of the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and acts supplemental thereto and amendatory thereof, the following order is hereby issued for the relief of settlers on the Yuma project, California-Arizona, viz.:

The portion of the instalment for building the irrigation system due December 1, 1911, on any entry or water right application, is hereby reduced to 50 cents per acre of irrigable land, and the balance of said portion of the instalment due December 1, 1911, shall be divided into two equal parts and added to the ninth and tenth instalments; provided, that this notice shall not apply to entries or water right applications on which two or more instalments of the building charge theretofore due and remaining unpaid on November 30, 1912, shall still remain unpaid on April 1, 1913, or upon which any portion of an instalment for operation and maintenance theretofore due remained unpaid on November 30, 1912. The time for payment of the portion of the instalment for operation and maintenance due December 1, 1912, is hereby extended to August 1, 1913.

SAMUEL ADAMS,
First Assistant Secretary of the Interior.

C. C. DRESCHER.*Decided March 7, 1913.***MINING CLAIM—VERIFICATION OF APPLICATION FOR PATENT.**

The verification of an application for patent to a mining claim by an attorney-in-fact for the claimant, at a time when the claimant himself is both resident and physically within the land district, is unauthorized, and entry allowed upon such application is invalid and can not be submitted to the Board of Equitable Adjudication.

LAYLIN, Assistant Secretary:

April 21, 1910, C. C. Drescher, through Thomas J. Russell, as attorney-in-fact, filed application for patent in the Sacramento, California, land office, for the Omega and Western Extension lode mining claims. The application was verified and filed by the attorney-in-fact and all subsequent proceedings leading to mineral entry were prosecuted by him.

The record before the register and receiver failed to disclose that the claimant was not a resident of or within the land district, as required by the act of January 22, 1880 (21 Stat., 61), amending section 2325, Revised Statutes, where applicants are represented in patent proceedings by agent, but they, nevertheless, permitted the proceedings and allowed entry. Evidence submitted upon call of the Commissioner of the General Land Office disclosed the fact that Drescher was a resident of, and within the Sacramento land district, during the proceedings. The Commissioner, by decision of July 11, 1911, held the entry for cancellation on the ground that proceedings through the attorney-in-fact were unauthorized, citing Rico Lode (8 L. D., 223), and Crosby and Other Lode Claims (35 L. D., 434).

It appears from the evidence on file that Drescher, on April 8, 1908, entered into a conditional agreement or option for the sale of the claims to Thomas J. Russell, who later acted as the attorney-in-fact. Russell, June 10, 1908, assigned his rights in the contract to the United Gold Mining and Milling Company, a corporation organized under the laws of Delaware. An agreement ratifying that of April 8, 1908, was entered into between Drescher and the United Gold Mining and Milling Company, February 26, 1909. The corporation later exercised its right under its option or agreement and conveyance to it was executed June 2, 1910. Under the agreement Russell was to conduct the patent proceedings at his own expense and the record shows that Drescher was at the time aged, infirm, physically unable to visit the claims for the purpose of supervising the posting of notices, etc. He died April 12, 1911.

Section 2325, Revised Statutes, requires the applicant for patent for land claimed under the mining laws to file in the proper land office "an application for patent under oath" and at the expiration of 60 days of publication required by the section, to file "his affidavit showing that the plat and notes have been posted in a conspicuous place on the claim during such period of publication." Section 2335, Revised Statutes, a part of the chapter in which section 2325 is included, requires that "all affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated." An exception to this statutory requirement was made in the act of January 22, 1880 (21 Stat., 61), which provided that where the claimant for patent is not a resident of or within the land district where the claim is located, the application for patent and affidavits required in connection therewith may be made by an authorized agent.

It is apparent from the facts as disclosed by the record in this case that the applicant was both a resident in and physically within the land district at the time the application for patent was executed and filed, and that, consequently, the provisions of the act of January 22, 1880, *supra*, were not applicable to his case, but that same is governed by the provisions of sections 2325 and 2335, Revised Statutes. There was, consequently, in this case no legal application by the applicant for patent or by any one possessed of an interest in the mining claims applied for. It is not possible for applicant to file a new application at the present time for the reason that he parted with all title in and to the claim on June 2, 1910, and for the further reason that he is dead. Therefore, the application must be treated as though it had never been sworn to at all, and as forming no valid or proper basis for the pending mineral entry.

The case can not be referred to the Board of Equitable Adjudication for confirmation under sections 2450 and 2457, Revised Statutes, which sections authorize the disposition of suspended entries upon principles of equity and justice as recognized in courts of equity, because of the further requirement that the law must have been substantially complied with. In this case, as stated in departmental decision in the Crosby and Other Lode Claims, *supra*, the law has not been complied with at all and does not come within the provisions of the equitable statutes.

The decision of the Commissioner of the General Land Office is accordingly affirmed, without prejudice, however, to the rights of the present owner of the claim to begin patent proceedings anew.

CHARLES STOUGH ET AL.

Decided March 8, 1913.

PRACTICE—HEARING—CONSOLIDATION AS TO A NUMBER OF ENTRIES.

Consolidation of the trial or hearing as to a number of entries is within the sound discretion of the Commissioner of the General Land Office or the register and receiver, and may properly be ordered, for convenience in the introduction and consideration of the testimony, where there are many material facts in common to all the entries; and one decision covering all the entries may be rendered, instead of a separate decision as to each entry.

AREA THAT MAY BE ACQUIRED UNDER THE COAL LAND LAWS.

Section 2347 of the Revised Statutes limits the amount of land that may be entered by an individual or association under the coal land laws; and an individual or association, although never having exercised the right of entry, can not by procuring others to make entry for his or its benefit, acquire a greater area than authorized by said section.

PRACTICE—PROCEEDINGS BY GOVERNMENT—NOTICE.

Proceedings by the government against a coal land entry are not invalidated by reason of failure to serve notice thereof upon the first transferee, where he no longer has any interest in the claim and is under no liability to protect those to whom he has transferred.

CONFIRMATION—PROVISO TO SECTION 7, ACT OF MARCH 3, 1891.

Where a proceeding was initiated against an entry within two years after the issuance of the final certificate, the mere postponement of the taking of testimony until after the expiration of that period, does not work a discontinuance of the proceeding or bring the entry within the proviso to section 7 of the act of March 3, 1891.

CONFIRMATION—COAL LAND ENTRY.

The proviso to section 7 of the act of March 3, 1891, does not apply to entries under the coal land laws.

LAYLIN, Assistant Secretary:

This is an appeal by The Gebo Coal Company, a corporation, from the decision of the Commissioner of the General Land Office of November 20, 1912, holding for cancellation the following coal entries, made at Lander, Wyoming:

No. 50 (04038) by Charles Stough for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 3, T. 33 N., R. 98 W., 6th P. M.

No. 51 (04039) by George Jackson for the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 11, T. 33 N., R. 98 W.

No. 52 (04040) by William H. Rhein for lot 4, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 2, lot 1, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 3, T. 33 N., R. 98 W.

No. 53 (04041) by Fred A. Earl for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 2, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 11, T. 33 N., R. 98 W.

No. 54 (04042) by Frederick Schlenning for the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 3, N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 10, T. 33 N., R. 98 W.

No. 55 (04043) by Fred S. Lee for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 2, and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 3, T. 33 N., R. 98 W.

No. 56 (03684) by John A. Honrath for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, lots 1 and 8, Sec. 28, and lot 4, Sec. 27, T. 34 N., R. 98 W.

No. 57 (03683) by Harry A. Taylor for the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 33, and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 34, T. 34 N., R. 98 W.

No. 58 (04046) by Eugene Amoretti, Jr., for the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 27, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 28, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 33, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 34, T. 34 N., R. 98 W.

No. 59 (04047) by Daniel F. Hudson for the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 33, N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 34, T. 34 N., R. 98 W.

No. 60 (04048) by James S. Vidal for lot 2, Sec. 3, T. 35 N., R. 98 W., S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 34, T. 34 N., R. 98 W.

No. 61 (04049) by Matt Borland for lots 3 and 4, Sec. 3, T. 33 N., R. 95 W., and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 34, T. 34 N., R. 98 W.

No. 63 (04051) by Fred Bragg for lots 2 and 3, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 28, T. 34 N., R. 98 W.

All of the above entries, except No. 63 (04051), made July 23, 1906, were made June 25, 1906. Coal entry No. 62, made June 26, 1906, by Richard H. Earl, for lots 6 and 7, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 28, T. 34 N., R. 98 W., was embraced in the same proceedings and held for cancellation by the decision of the Commissioner now under review, but counsel for appellant states that no appeal is prosecuted as to it.

October 25, 1907, the Commissioner directed the register and receiver to issue notice of charges, based upon the report of a special agent that each entryman "did not make said entry for his own use and benefit, but did make said entry in the interest of Samuel W. Gebo, and other parties to the agent unknown." Notice of these charges was served upon the entrymen, who filed a sworn denial and application for a hearing. January 22, 1908, The Gebo Coal Company, through its counsel, filed a notice of its intervention in the proceedings, alleging that the lands had been conveyed to Samuel W. Gebo by the entryman, June 25, 1906, and had been transferred to it by Gebo, April 4, 1907.

December 26, 1907, the register and receiver set the hearing for January 29, 1908, at their office. January 14, 1908, the Commissioner directed them to postpone the hearing indefinitely. Counsel for the entrymen and the transferee company protested and demanded that the hearing proceed, but their protest was overruled. May 5, 1909, the register and receiver fixed July 12, 1909, as the date of hearing, at which time the chief of field division appeared on behalf of the United States and introduced certain testimony, there being no appearance for the entrymen, nor for the transferee company. December 28, 1909, the register and receiver rendered their decision recommending cancellation of the entries. The company filed a motion for rehearing which was denied by the register and

receiver March 4, 1910, and their decisions were affirmed by the Commissioner March 11, 1911. Upon appeal, the Department by its decision of February 17, 1912, vacated the decisions below and remanded the matter for further hearing.

The register and receiver fixed July 25, 1912, as the date for further hearing, at which time the chief of field division appeared on behalf of the United States with certain witnesses, but stated that he did not desire to introduce further testimony. There was no appearance by the transferee company or the entrymen, except Eugene Amoretti, Jr., who appeared by counsel, stating that he did not desire to introduce any testimony or cross examine the witnesses already produced by the United States.

By decision of August 19, 1912, the register and receiver again recommended the cancellation of the entries, which was affirmed by the decision of the Commissioner, from which the present appeal was prosecuted.

The hearing, as to all the entries, was consolidated, and one decision has been rendered by the register and receiver, and the Commissioner, embracing all. Counsel for appellant contends that there was no authority to so consolidate the entries into one trial and that separate decisions should have been rendered as to each entry. Consolidation of a trial or hearing as to a number of entries is within the sound discretion of the Commissioner or register and receiver, and may properly be ordered where there are many material facts common to all the entries for convenience in the introduction and consideration of the testimony. The rendition of one decision, covering all the entries, instead of separate decisions as to each entry, is likewise a mere matter of convenience, and in no wise jeopardizes the rights of the parties.

Counsel next contends that the charge made as to each particular entry is insufficient. This objection was not made until the appeal from the present decision of the register and receiver, and after sworn denials of the charges and applications for hearing had been filed and the resulting proceedings had been prosecuted. The argument is that paragraph 32 of the regulations of July 31, 1882 (1 L. D., 687), in effect at the time these entries were made, required as to entries made in pursuance of a preference right under section 2348, Revised Statutes, an affidavit by the entryman that:

I . . . make the entry for my own *use* and benefit, and not directly or indirectly for the *use* and benefit of any other party—

while paragraph 14, of the regulations of April 12, 1907 (35 L. D., 665), in effect when the charges were issued, require an affidavit of the entryman that:

I . . . make the entry in good faith for my own benefit, and not directly or indirectly, in whole or in part, in behalf of any person or persons whomsoever.

The Department is of the opinion that the meaning of the two forms of affidavit is substantially the same, and fails to see any force in the argument urged by counsel. It is further argued that paragraph 37 of the regulations of July 31, 1882, recognized assignments of the right to purchase under section 2348, and that under the charge as made Gebo or the other unknown parties may have simply purchased such an assignment. In answer to this it is merely necessary to point out that under the charges made the entry was not made by Gebo, but ostensibly by each entryman, although secretly for or by Gebo. The regulations, however, contemplate an assignment to a qualified individual, who would make entry in his own right and name.

It is further argued that the charge as made does not allege that Gebo was disqualified from making a coal entry, and that an entry made in the interest of another, who is likewise qualified, is permitted by law. In this connection the case of the United States *v.* Colorado Anthracite Company (225 U. S., 219), is instructive. The court there said, at page 224:

While the coal-land law does not expressly prohibit an entry by one person for the benefit of another, it does limit the quantity of land that may be acquired thereunder by one person to 160 acres, and the quantity that may be acquired by an association of persons to 320 acres and, in exceptional instances, 640 acres; and it declares that its sections "shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions." These restrictions, as this court has held, forbid individuals and associations from acquiring public coal land in excess of the quantities prescribed, whether directly by entries in their own names or indirectly by entries made for their benefit in the names of others. And so, one person cannot lawfully make an entry in the interest of another who has had the benefit of the law, or in the interest of an association where it or any of its members has had the benefit thereof, or in the interest of a person or an association where he or it has not had such benefit but is seeking, through entries made or to be made by others in his or its interest, to acquire a greater quantity of land than is permitted by the law.

While the charges herein were somewhat inartificially drawn, the Department is of the opinion that, when considered together with all the proceedings, they sufficiently advised all the parties in interest that the charge preferred was that the entries were made in the interest of Gebo for a larger area than he could rightly acquire directly by himself. The contention that the entries could be made in the interests of Gebo, as long as he did not disqualify himself by making a coal entry, is contrary to the above quoted holding of the Supreme Court, and the decision of the Department in *George W. Dally et al.*

(41 L. D., 295), wherein a similar contention was overruled, at page 364:

The appellants' argument is based upon the assumption that the sole disqualification is contained in section 2350 and entirely overlooks the limitation upon the area which may be acquired contained in section 2347. This view would permit an individual or association of individuals to acquire an unlimited area of coal lands through entries made in their interest by qualified entrymen by the simple device of refraining from making an entry themselves. Such a result is prohibited by section 2347 and also is contrary to the views both of the courts and the Department.

It is next contended that the proceedings are invalid because there has at no time been any service of notice thereof upon Gebo, the immediate transferee of the entryman, and the predecessor in title of the appellant. Gebo filed no notice of his interest with the local land officers, but it is asserted that the fact of the conveyance to him was disclosed by the reports of the special agent upon which the charges were based, and that accordingly notice should have been served upon him, citing *Radabaugh v. Horton* (17 L. D., 48), and *Romance Lode Mining Claim* (31 L. D., 51). At the time the notice of charges was issued all of Gebo's interest in the lands had passed to the Gebo Coal Company, which was the real party in interest. He was no longer a transferee in the sense of that term as used in the Rules of Practice. Further, in the conveyance from Gebo to the Gebo Coal Company there are no covenants warranting the title.

Where there has been no fraud, mistake, or accident, a purchaser who has taken a deed without covenants has no right, for a defect in the title, or for the existence of an encumbrance, to detain the purchase money, or to recover it in case of payment. [Devlin on Deeds, 2nd edition, section 957.]

Gebo accordingly was not even confronted with the possibility of liability to the company in the event that the entry should be canceled. It was not necessary to serve any notice upon him as he had no interest or liability to protect.

It is next urged that the evidence is insufficient to sustain the charge made. Upon the merits, the Department is of the opinion that the concurring conclusions below, that the entries were made in the interest of Gebo for an area larger than that permitted by law, are correct and that, therefore, the entries are illegal and must be canceled.

Counsel also contends that the entries are within the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), which reads:

That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him.

The argument is that although the charge or protest was filed within two years from the issuance of the final receipt, the indefinite postponement of the proceedings directed January 14, 1908, worked their discontinuance, and that the further proceedings held after the expiration of the two year period were barred. In the first place the Department is of the opinion that a mere postponement of the time of taking testimony did not work a discontinuance of the proceedings filed within the two year period. Further, this proviso uses the term preemption entry in its technical and restricted sense. (*Menasha Wooden Ware Company*, assignee of William Gribble, 37 L. D., 564), and refers to the right of preemption based upon an agricultural settlement and not to entries of coal land.

The decision of the Commissioner is accordingly affirmed.

STATE OF WASHINGTON v. GEISLER.

Decided March 8, 1913.

SCHOOL LANDS—IDENTIFICATION BY SURVEY—INTERVENING SETTLEMENT.

The State of Washington acquires no vested right or title under the grant of sections 16 and 36 made to said State, for school purposes, by the act of February 22, 1889, until said sections have been identified by survey: and, by virtue of section 2275 of the Revised Statutes, as amended by the act of February 28, 1891, a *bona fide* settlement upon a section 16 or 36, existing at the date of such identification, excepts the land covered thereby from the operation of the grant.

SCHOOL GRANT—WHEN EFFECTIVE—OTHER DISPOSITION BY CONGRESS.

The grant of sections 16 and 36 made to the State of Washington by the act of February 22, 1889, was, prior to survey of the land, in compact only—an executory agreement; and until survey it was competent for the Congress of the United States to make other disposition of the land.

LAYLIN, *Assistant Secretary*:

This is the appeal of the State of Washington from a decision of the Commissioner of the General Land Office, January 2, 1912, dismissing its protest against the homestead entry of Edward A. Geisler, as to the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 36, T. 30 N., R. 29 E., Waterville land district, Oregon.

The land in controversy being part of a numbered section of the grant made to the State of Washington for common schools, by the act of February 22, 1889 (25 Stat., 676), was thereby granted, unless under the facts of this case it was excluded therefrom by the settlement claim of Edward A. Geisler, subsisting at date of survey in the field.

November 19, 1909, Geisler, upon allegation of such subsisting settlement claim, was permitted to make homestead entry of said land, and final certificate issued thereon November 5, 1910. It ap-

pearing that the State had not been notified of such entry nor specially cited in the final proof notices, it was directed April 13, 1911, that the proper officer of the State be allowed time within which to show cause why the entry should not be allowed to remain intact, and November 25, 1911, the State protested against the issuance of patent thereon. The fact of such subsisting settlement claim is not disputed but it is contended upon the appeal that although the land had not been surveyed at date of the State's admission into the Union, yet it then passed to the State as of a present grant, February 22, 1889.

This contention rests mainly upon a decision of the Supreme Court of Washington, January 4, 1912, in the case of *State v. Whitney et ux.* (120 Pac. Rep., 116). The court held in that case that said act of February 22, 1889, granted to the State for school purposes the sixteenth and thirty-sixth sections in every township, as a present grant, and that on the State's adoption of its constitution affirming the enabling act the grant took effect as of the date of the act and passed the entire title of the United States to the lands so granted, whether surveyed or unsurveyed, without regard to the question whether such unsurveyed lands were at that time settled upon and in the possession of settlers under the public land laws of the United States.

This same contention has been heretofore frequently made by the State of Washington, and other States who hold their school lands by the same tenure, and in the course of the adjustment of these grants has been repeatedly denied by the land department. See *State of Washington v. Kuhn* (24 L. D., 12); *State of South Dakota v. Riley* (34 L. D., 657); *State of South Dakota v. Thomas* (35 L. D., 171). The question, however, has not been considered here at any great length since the decision of the Supreme Court of the State, above referred to, and it is thought proper at this time to more fully restate the position of the Department thereon.

The act of February 22, 1889, *supra*, was an act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutional and State governments and "to make donations of public land to such States." Section 10 thereof provides:

That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress other lands equivalent thereto in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may

provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

And by section 11 it was provided that—

Such lands [all lands therein granted for educational purposes] shall not be subject to preemption or homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes.

At the date of this act section 2275 of the Revised Statutes was in full force and effect and applicable to all public land States alike. It provided that “where settlements, with a view to preemption, have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the preemption claim of such settler.” A further provision of the same section gave the State or Territory in which the lands so subject to the claims of settlers were located, a right of indemnity. There was also subsisting at the date of said act, not only the general homestead laws but also an act, May 14, 1880 (21 Stat., 140), inviting settlement upon unsurveyed lands and extending the promise of the Government to protect such settlement claims by allowing the same time to perfect and put them of record as was then allowed settlers under the preemption laws. So, prior to the passage of the act of February 22, 1889, *bona fide* settlement upon unsurveyed lands in any public land State initiated a valid right, and if upon lands which when surveyed became a section 16 or 36 a superior right as against the State under its school grant. These prior enactments were general laws but it was altogether competent for the Congress to repeal or modify such laws or to give them a more limited application, and in the enactment of the act of February 22, 1889, it surely did so. There is little room for difference of opinion upon this question. Section 11 of the last-named act can mean nothing less than that lands which upon survey thereafter made would be designated sections 16 and 36, should not be subject to settlement under any law. Therefore, no right could be initiated by such settlement in the States named. They were “reserved for school purposes only.” This state of the legislation continued until February 28, 1891, and during the time between the admission of the State of Washington into the Union and that date, a period of about three years, whether the granting act be viewed as a present grant or as a reservation for a future grant, sections 16 and 36 in said State, whether surveyed or unsurveyed, were not subject to settlement. But

February 28, 1891, Congress passed an act (26 Stat., 796), amending section 2275 of the Revised Statutes, to read as follows:

Sec. 2275. Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on section sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers.

This Department has repeatedly held that this is a general act applicable to all the public land States alike. Manifestly, it is such in terms, and if it were the intention of Congress to exclude from its operation the State of Washington it is thought that appropriate language would have been used to express such intention.

But it is the further contention of the State, based on the decision of its supreme court in said case of *State v. Whitney et ux.*, that even admitting it was the intention of Congress to repeal the prior special legislation affecting the State of Washington, upon this question, still, Congress was without power to enact such legislation. At page 121 of the decision in the case of *State v. Whitney*, quoting from the decision of the Supreme Court of the United States in *Beecher v. Wetherby* (95 U. S., 517), it was said:

It was, therefore, an unalterable condition of the admission obligatory upon the United States, that section sixteen in every township of the public lands in the State which had not been sold or otherwise disposed of should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States constituting only a pledge of a grant in the future, or as operating to transfer their title to the State upon her acceptance of the proposition as soon as the sections could be afterwards identified by the public surveys. In either case the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do in respect to them and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or if any further assurance of title was required to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result, they could not be diverted from their appropriation to the State.

While some things were *said* in that decision which justify the argument set forth by the Supreme Court of Washington in support of its conclusion in *State v. Whitney*, *supra*, the facts considered,

there was nothing *decided* therein pertinent to the argument upon this appeal. It appears from the statement of facts in *Beecher v. Wetherby*, though not affirmatively from the decision itself, that the lands there in controversy had been surveyed in the field as early as June, 1854. The grants of school lands to the State had been made August 6, 1846, and by joint resolution of the Legislature of Wisconsin, February 1, 1853, the State had assented that the Menominee Indians should be permitted to remain on a tract of land in said State, therein described. The section 16 there in controversy was part of such tract as confirmed to this tribe of Indians by treaty between it and the United States, May 12, 1854. By an act of Congress, February 6, 1871 (16 Stat., 404), which was long after the lands had been surveyed, the lands so set apart for these Indians were directed to be sold for their benefit, and including this section were sold under the direction of the Secretary of the Interior and patents of the United States issued pursuant thereto. The patents so issuing upon the sale of section 16 were the patents declared void by the court. These pertinent and controlling facts considered, it is clear that the court's ruling rests upon the principle repeatedly declared by both the land department and the courts that the grant to the State had attached upon identification of the land by survey, subject only to the Indian right of occupancy, and that upon the extinguishment of the right the State's title was complete; that having the legal title, it then came into the right of possession. This analysis of the decision brings it in harmony with other decisions of the Supreme Court of the United States upon this question. See *Sherman v. Buick* (93 U. S., 209); *Heydenfeldt v. Daney Gold and Silver Mining Co.* (Id., 634); *Minnesota v. Hitchcock* (185 U. S., 373).

The principle deducible from these authorities is that the grant to the State of Washington was until survey of the land in compact only—an executory agreement—and until that time it was competent for the Congress of the United States to make other disposition thereof. With the policy which induced the Congress by the act of February 28, 1891, to provide for other disposition this Department has nothing to do; that such is the effect of that act is clear. It is not only clear in terms, but that there might be no mistake in its administration, based upon such specious reasoning as is now advanced by the State as to alleged violation of the spirit of the compact, adequate provision was made to indemnify the State for losses which might be occasioned thereby.

The decision appealed from is affirmed.

KIN-NIP-PAH ET AL.

Decided March 8, 1913.

INDIAN ALLOTMENT—MINOR CHILDREN—SECTION 4, ACT FEBRUARY 8, 1887.

The provisions of section 4 of the act of February 8, 1887, authorizing allotments to the minor children of an Indian settler on the public domain, include step-children and all other children to whom the settler stands *in loco parentis*.

LAYLIN, *Assistant Secretary*:

Appeal has been filed from the decision of the Commissioner of the General Land Office, holding for rejection Indian allotment applications filed by Nic Cly, a Navajo Indian, for his minor step-children, Kin-nip-pah and Oske-nip-pah, under section 4 of the act of February 8, 1887 (24 Stat., 388), which provides:

That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations.

The theory upon which the decision of the General Land Office was based is shown in the following quotation from the decision of May 29, 1912:

By the laws under which the application was filed, no provision is made for the making and filing of allotment applications by step-parents for children occupying that relation.

The argument seems to be that because the act makes no provision for selection of allotments by "step-parents" for their "step-children," such applications are not permissible. This is giving the law an altogether too restricted construction. The purpose of that law is to give to Indians who have settled on the public domain and to their immediate families allotments of land and to place them in the same position they would have occupied had they been living upon an Indian reservation. To carry out this purpose, the law should be construed to permit applications by one entitled himself to take allotment in behalf of all those to whom he stands *in loco parentis*.

It is further stated in the decision appealed from that there is not a sufficient showing that the land selected can not be irrigated from any irrigation project actually constructed, and will not be capable of irrigation from any project now under construction when completed. This is an objection which may be cured by further showing. Opportunity should be given for that showing.

The decision appealed from is therefore reversed, and the case remanded for further procedure in accordance with the views herein expressed.

LESLIE A. REINOVSKY.*Decided March 10, 1913.***SETTLEMENT UPON UNSURVEYED LAND—WITHDRAWAL BY GOVERNMENT.**

Settlement, residence, and improvement upon a tract of unsurveyed public land confer no such right upon the settler as will prevent withdrawal thereof by the government for a public purpose.

LAYLIN, Assistant Secretary:

Leslie A. Reinovsky has appealed from decision of the Commissioner of the General Land Office of January 26, 1912, rejecting his application to make homestead entry of the S. $\frac{1}{2}$ SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 12, T. 24 N., R. 11 E., W. M., North Yakima, Washington, land district.

It appears from the record before me, including the report of a forest ranger, that applicant settled upon the lands on or about September 6, 1902, and resided thereupon continuously until March, 1911, with the exception of occasional absences of a month or two during the summers when he was away at work. The applicant was married in 1910 and with his wife remained on the land from that time until March 1911, when both went to Alaska and have not returned. The improvements upon the claim consist of a house 14 by 18 feet, and a small tract of land cultivated in potatoes, timothy and clover. The land was unsurveyed at date of applicant's settlement, plat of survey being officially filed in the local land office September 1, 1910.

On September 2, 1910, Reinovsky filed application to enter which was rejected because of the fact that on September 13, 1904, the land had been withdrawn under the first form of withdrawal, act of June 17, 1902 (32 Stat., 388), in connection with the North Yakima reclamation project, and on March 2, 1907, withdrawn as a part of the Snoqualmie National Forest, and on February 23, 1909, included by executive order in the Keechelus Bird Reserve, all of which withdrawals were existent at date of application to enter, and are still in force.

It is contended that the settlement upon and occupation of the land prior to the dates of withdrawal above enumerated, excluded the land from the operation of said withdrawals and that the application to enter under the homestead law should be granted.

Section 3 of the act of May 14, 1880 (21 Stat., 140), provides that settlers who have or shall hereafter settle upon public lands of the United States, surveyed or unsurveyed, shall be allowed the same time to file their homestead applications as is allowed to settlers under the preemption laws to put their claims of record, and that their rights shall relate back to the date of settlement the same as if they had settled under the preemption laws. In the cases of Frisbie

v. Whitney (9 Wall., 187), and Yosemite Valley case (15 Wall., 77), *Buxton v. Traver* (130 U. S., 232), and *Russian American Packing Co. v. United States* (199 U. S., 570), the Supreme Court of the United States laid down the principle that while possession initiated by settlement gives the preemption settler a preference right over others, it does not confer a vested right as against the United States, to the lands occupied, and that until such a settler has made entry and fully complied with the law, Congress may withdraw the land from sale and entry and appropriate it to other uses, even though it defeats the inchoate right of the settler. The principle set forth in the cases cited is directly applicable to settlements under the homestead law, made upon unsurveyed lands. In fact, the act of 1880, *supra*, expressly states that such a settler shall be allowed the same time to enter and that his rights shall relate back the same as if under the preemption laws.

In the case of *United States v. Hanson* (167 Fed., 881), the Circuit Court of Appeals, Ninth Circuit, had before it the identical question here involved, and held that there is nothing obtained by settlement and residence upon and improvement of unsurveyed public land under the homestead law which creates any impediment to the power of the Government to devote the land to any public purpose.

Section 3 of the reclamation act specifically empowers the Secretary of the Interior to withdraw from entry such public lands as he may find to be required for irrigation works contemplated under the reclamation act, and withdrawals so made have been uniformly held to be in effect legislative withdrawals and the use of the lands thereunder in connection with the reclamation act to be a public use.

For the foregoing reasons the decision of the Commissioner is held to be correct and is hereby affirmed. It may be stated in conclusion that the Acting Director of the Reclamation Service reports that the lands will be needed for reclamation purposes and that applicant was so advised at time of the withdrawal in 1904. However, in view of the fact that the settlement had been initiated prior to the withdrawal the Director recommends that applicant be compensated to the extent of the value of improvements, which plan of equitable adjustment is hereby approved as to improvements which applicant had placed on the land prior to notice of withdrawal and which constitutes the full measure of relief which the Department is authorized to extend in the premises.

STOUT v. LOW.*Decided March 11, 1913.***CONTEST—CHARGE—ABANDONMENT.**

The charge in an affidavit of contest against a homestead entry that the entryman has "wholly abandoned" the land is sufficient, without necessity for the further allegation that the abandonment has continued for more than six months; and upon proof or admission of the charge the entry is subject to cancellation.

CONTEST—PROOF OF CHANGE OF RESIDENCE.

In a contest charging abandonment, proof, after due notice, that the entryman has changed his residence from the homestead to another place, warrants cancellation of the entry, without reference to the duration of his residence elsewhere.

LAYLIN, Assistant Secretary:

On February 16, 1911, Thomas J. Stout filed his affidavit of contest against the homestead entry made on April 4, 1908, by David B. Low for the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 9, and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 10, T. 2 S., R. 24 W., Camden, Arkansas, land district, charging that—

The said entryman has wholly abandoned the said land and failed to reside upon and cultivate the same as required by law.

On May 2, 1911, Stout filed his affidavit to secure an order for publication of notice of contest, in which he alleged, among other things, that Low abandoned said land and went to the State of Missouri during the year 1909, and that he had since that time been absent from the land and could not be found. Notice of contest was served by publication, and Low filed no answer to the charge and made default at the hearing. Thereupon the local officers, in conformity with Rule of Practice 14, recommended the cancellation of the entry. The contestant has appealed from the decision of the Commissioner of the General Land Office, dated November 2, 1911, reversing this action and dismissing said contest, upon the ground that the affidavit does not set forth facts sufficient to warrant the cancellation of the entry.

Section 2297 of the Revised Statutes provides for the forfeiture of a homestead entry upon proof that the entryman "had actually changed his residence, or abandoned the land for more than six months."

If, therefore, it be proved after due notice to him that he has changed his residence from the homestead to another place, it must be canceled without reference to the duration of his residence elsewhere; and upon proof that he has abandoned the land for more than six months, the entry is forfeited without necessity for evidence that he has acquired another domicile, and the purpose and reason for his absence from the tract become immaterial.

Section 2297 of the Revised Statutes, while defining two grounds of forfeiture and determining the rules of evidence applicable thereto,

does not sanction, either directly or by any necessary implication, an abandonment of a homestead entry for six months or a less time without excuse or notice to and consent of the land department. Congress has in many acts provided for leave of absence for less than six months, thus recognizing that the homestead law does not permit an unauthorized absence of any material duration; and the act of March 2, 1889 (25 Stat., 854), would be rendered futile and inoperative were it held that an entryman might, with impunity, absent himself from his homestead without making the showing and obtaining the permission demanded by that act.

In departmental practice and in the public mind an abandonment of a homestead entry is always understood to mean an unauthorized absence from the land. When, therefore, notice of a charge that he has wholly abandoned his homestead is served upon an entryman he is fully advised, under the present Rules of Practice, "in ordinary and concise language," of the fact constituting the ground of contest, such a charge being as much an allegation of fact as a charge of abandonment for more than six months. It is the duty of the entryman under such Rules of Practice to specifically meet and respond to the charge in his answer. If absence from the land for more than six months is admitted, no hearing should be ordered, since that fact requires cancellation of the entry under section 2297, Revised Statutes above referred to. If he admits that he has *wholly* abandoned the land, whether by direct answer or by failure to answer, there is no reason of law or good administration why cancellation should be delayed until there is evidence that the abandonment has continued for more than six months.

It is not meant hereby to hold that where an entryman has been absent from his homestead for less than six months it would not be competent for him to show, in his answer to a charge that he has wholly abandoned the land, that his absence was due to reasons not inconsistent with good faith and did not in fact constitute an abandonment of the land. Nor would such a charge as was preferred in this case lie against an entry during a leave of absence regularly granted. In such case it should be alleged and proved that the abandonment preceded the leave of absence or that the entryman was not entitled to such leave. Neither would a charge that a homestead entryman had been absent from the land for a period of six months or less warrant a hearing. If mere absence is relied upon to support a charge of abandonment, it must have persisted for more than six months. But abandonment, as a fact, may be complete in less time, and if proved or confessed the entry must be canceled.

For the reasons above stated the decision appealed from is reversed, and the entry canceled. All decisions in conflict herewith will no longer be followed.

RECLAMATION—NORTH PLATTE PROJECT—PAYMENTS DEFERRED.**PUBLIC NOTICE.**

DEPARTMENT OF THE INTERIOR,

Washington, March 11, 1913.

1. In pursuance of the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and of the act of February 13, 1911 (36 Stat., 902), notice is hereby issued for the North Platte project, Nebraska-Wyoming, as supplemental to public notices of December 30, 1911 (40 L. D., 336), March 14, 1912 (40 L. D., 504), and notices and orders amendatory thereof or supplementary thereto for the said project, viz:

2. All lands in private ownership subject to the said public notices and orders shall be subject to all the charges, terms and conditions announced in said public notices and orders, provided, that for all water-right applications filed for such lands during the calendar year 1913, the first instalment of the building, operation and maintenance charges shall be due on December 1, 1913, and subsequent instalments shall become due on December first of each year thereafter.

3. Until further notice the amount of the portion of instalment for operation and maintenance, and the conditions under which payment therefor shall be made, shall be as heretofore announced.

4. The object of this notice is to effect a temporary suspension, during the calendar year 1913, of the provisions of prior public notices and orders in so far as they provide for the accumulation of charges for building, operation and maintenance against lands in private ownership.

LEWIS C. LAYLIN,

*Assistant Secretary of the Interior.***RECLAMATION—NORTH PLATTE PROJECT—PAYMENTS REDUCED.****PUBLIC NOTICE.**

DEPARTMENT OF THE INTERIOR,

Washington, March 11, 1913.

In pursuance of the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), notice is hereby given as follows for the lands under the North Platte Project, Nebraska-Wyoming, viz:

1. The portion of instalment for operation and maintenance due December 1, 1912, which must be paid before water is furnished for

the irrigation season of 1913, and the portion of the instalment for operation and maintenance which falls due on December 1 of 1913, and of each year thereafter, is hereby reduced to \$1.10 per acre of irrigable land until further notice; and such payment shall entitle the applicant to a maximum water supply of not to exceed 2.5 acre feet per acre of irrigable land per annum, in no event, however, in excess of the amount needed on the land for beneficial use.

2. Should the quantity of water stated be found to be insufficient for the proper irrigation of any tract, additional water may be obtained on application therefor by the landowner or entryman and payment for same at the rate of 25 cents per acre foot shall become due on December 1 of the year in which the water is used and such sum must be paid before water is furnished to such tract in the following year.

3. Any deficiency in the amounts to be paid for operation and maintenance charge which may arise by reason of the reduction of such charge shall be duly announced and added to the portion of the instalment for operation and maintenance falling due after such announcement.

LEWIS C. LAYLIN,
Assistant Secretary of the Interior.

RECLAMATION—WILLISTON PROJECT WATER SERVICE.

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,
Washington, March 11, 1913.

Whereas, in pursuance of the order of April 14, 1911 (40 L. D., 31), water was furnished in the season of 1911 to lands in the Williston Project, North Dakota, constructed under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and

Whereas, the said order was modified by the order of June 25, 1912 (41 L. D., 94), providing for extension of time of payments, under conditions therein set forth, and

Whereas, under the provisions of the above orders landholders were required to make payments on account of operation and maintenance on a total of 4,000 acres before the barge would be launched in 1913, and also to pay such sums as may have accrued on account of operation and maintenance in the years 1911 and 1912,

Now, therefore, in pursuance of the provisions of the said Reclamation Act and acts amendatory thereof and supplemental thereto, public notice is hereby issued as follows:

1. Water will be delivered in 1913 to any landholder under existing canals and laterals who was entitled to receive water in 1911 or in

1912, and who shall have paid all charges for those years, provided said landholder complies with the conditions governing water-right applications and payments for the year 1913, as hereinafter set forth.

2. Water will be delivered to any other holder of irrigable land under existing canals and laterals who shall comply with the terms of this order.

3. Water will be furnished to all public land farm units and lands in private ownership which remain subject to the former announced building charge of \$38 per acre, and are not subject to cancellation for failure to make two payments when due. For any such lands for which entries or applications are subject to cancellation, water may be obtained under the provisions of this order.

4. The charges for building, operation and maintenance are divided into two parts as follows:

(a) For building, at the rate to be hereafter announced. The portion for the first instalment shall be 50 cents per acre of irrigable land.

(b) For operation and maintenance \$1 per acre of irrigable land per annum until further notice, plus \$1 per acre foot for water delivered.

5. The first instalment of the charges for building, operation and maintenance shall be due on April 1, 1913, and no water will be furnished in 1913 until the portion for building charge, 50 cents per acre, has been paid. The portion for operation and maintenance, including the charge per acre foot, must be paid before water is furnished in 1914.

6. No water shall be delivered in 1913 except to land covered by a recorded water-right application. New water-right applications may be made at the office of the Project Manager, Williston, North Dakota, and all payments shall be made to the special fiscal agent of the Reclamation Service at Williston, North Dakota. New water-right applications filed hereunder shall be so modified as to state that the charge per acre to be paid by the applicant shall be as hereafter announced.

7. Each holder of lands under this project shall pay the charges for building and betterment, operation and maintenance, when announced, on the entire irrigable area of his land as shown on approved farm unit plats.

8. The operation of the pumps will be planned with a view to an approximately uniform rate of delivery of water and for adequate irrigation in the shortest practicable operating period, namely, for an irrigation season of 80 days beginning not earlier than June 1 and not later than June 15 and closing not earlier than August 19 and not later than August 30 of each year, and a water supply during

each season of 2 acre-feet of water for each acre of land irrigated and cultivated, or so much thereof as the water users may require.

9. Landholders who take advantage of these conditions shall be subject to the terms of public notices to be issued hereafter, which shall provide for an increased building charge, the amount of which can not be stated at this time.

10. Former public notices and orders shall remain in full force and effect except as herein modified.

LEWIS C. LAYLIN,

Assistant Secretary of the Interior.

The undersigned, owner or holder of ----- Sec. ----, T. -----, R. -----, containing ----- irrigible acres, in the Williston Project, has read the foregoing notice and agrees to comply with the requirements thereof.

-----, Witness.

JULIA E. WARD ET AL.

Decided March 12, 1913.

INSANE ENTRYMAN—POWER OF COURTS TO FIX SUCCESSION.

Prior to the issuance of patent upon a homestead entry the title remains in the United States, and State courts have no jurisdiction to fix the right of succession to the land or to determine under what circumstances the right thereto shall pass from the entryman to a successor in interest.

INSANE ENTRYMAN—ENTRY WITHIN RECLAMATION PROJECT.

The equitable title which vests in a homestead entryman under the act of June 8, 1880, upon his becoming insane, is subject, where the land lies within a reclamation project, to the provisions of the reclamation act; and upon the establishment of farm units, patent can issue to him for only one of the farm units formed from his entry, the remaining units being subject to assignment under the act of June 23, 1910, by his legal guardian duly authorized to act for him during his mental disability.

LAYLIN, *Assistant Secretary:*

Julia E. Ward, James F. Johnson, Wayne S. Bradley, and Clifford B. Carlisle appealed from decision of the General Land Office of March 14, 1912, rejecting assignments severally made of parts of William R. Ward's homestead entry for lot 4, Sec. 30, T. 3 N., R. 2 W.; SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 25, T. 3 N., R. 3 W., Boise, Idaho.

March 10, 1905, William R. Ward made homestead entry for the three tracts here involved, together with the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 25. The land had been withdrawn December 22, 1903, in the Payette-Boise Project, and the entry was made subject to adjustment to farm units, when such had been fixed. March 7, 1906, the entryman was

adjudged insane and committed to the insane hospital September 25, 1908. Julia E. Ward, as guardian for her insane husband, submitted final proof, which was accepted by the General Land Office August 24, 1909.

September 16, 1911, in suit of Julia E. Ward *v.* William R. Ward for absolute divorce, the court adjudged:

That the said plaintiff, Julia Edith Ward, is the owner of the property hereinafter described; and that all right, title, and interest of the said defendant, William R. Ward, is hereby divested out of the said William R. Ward and vested in the said Julia Edith Ward of, in and to lot 4, Sec. 30, T. 3 N., R. 2 W., and the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 25, T. 3 N., R. 3 W., B. M., being the community property of the said parties.

November 14, 1911, after filing of farm unit plat in the project, Julia E. Ward, in her own right, assigned lot 4 (farm unit C) to James F. Johnson and the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ (farm unit B) to Wayne S. Bradley, and November 18, 1911, she assigned the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ (unit D) to Clifford B. Carlisle. All these assignments were made under act of June 23, 1910 (36 Stat., 592). The Commissioner held:

This office will not recognize the assignment of any portion of the land embraced in the original homestead entry unless the same shall have been executed by a duly authorized guardian of the estate of the said William R. Ward, accompanied by an order of a court of competent jurisdiction specifically authorizing the assignment of part or all of the lands embraced in the original entry for the use and benefit of the said William R. Ward.

There was no error in such decision. The act of June 8, 1880 (21 Stat., 166), provides that patent shall issue to an entryman when he becomes or is adjudged insane without further proof of compliance with law. This statute, however, is modified by the Reclamation Act, which withholds patents in all cases in reclamation projects until the charges for reclamation are paid. The result is that William R. Ward is entitled to patent whenever and as soon as the reclamation charges are paid.

Until patent issues, title remains in the United States in interest of and for benefit of the entryman. The State courts have no jurisdiction to fix the succession or under what circumstances the right shall pass from the entryman to a successor in interest. The homestead is immune to process or adjudication of any State court. It is not until title passes from the United States that the State courts can by their judgment affect title to the land. In *McCune v. Essig*, 199 U. S., 382, the Supreme Court held that the interest which arises in an entryman by his entry—as to who can fulfill the conditions of settlement and proof in case of his death and to whom the title passes—depend upon the laws of the United States.

But for subsequent legislation relative to reclamation entries, Ward was entitled to patent for his entry as soon as his insanity was shown to satisfaction of the land department. By act of June 8, 1880,

supra, equitable title vested in him, if he to time of his insanity had complied with the law of his entry. Nothing more was required of him, not even proof of his loyalty to the Government.

The entry, however, was made under the Reclamation Act, and was subject to adjustment to farm units when established, and to compliance with other requirements of the Reclamation Act. When farm units were established, patent could issue for but one of the four farm units formed from the entry. Under act of June 23, 1910 (36 Stat., 592), he was entitled to assign his entry as to the other three farm units, and the proceeds of such assignments must inure to him as, in equitable aspect, real estate, subject to such rights in the fund so created as his wife, Julia E. Ward, would have had in the land had patent issued to him. Such assignment can be made by his legal guardian authorized to act for him for protection of his interests in property during his mental disability, and assignments so made, approved by the court having jurisdiction of estates of insane persons, must, from necessity of Ward's disability to act for himself, be recognized by the land department in absence of legislation by Congress applicable to such case.

The Reclamation Act also provides that title will be withheld as security for reclamation charges, and no patent be issued until they are paid.

The Department does not question authority of the Idaho courts over the property of insane persons, but, until the law of the entry of public lands is fully complied with, the title remains in the United States, to be administered by the land department under the laws of the United States. *Wilcox v. Jackson*, 13 Pet., 498, 516-17; *Hall v. Russell*, 101 U. S., 503, 510; *Hutchinson Inv. Co. v. Caldwell*, 152 U. S., 65, 70; *Davenport v. Lamb*, 13 Wall., 418, 427; *McCune v. Essig*, *supra*. The State courts and State law can not divert or interfere with the succession, or mode of perfecting title, or make disposal of lands subject of an entry. Title can only be passed in the mode and to the persons provided by Congress.

The decision is affirmed.

THOMAS V. LAKIN.

Decided March 12, 1913.

ROSEBUD INDIAN LANDS—PRICE—ACT OF MARCH 2, 1907.

The price of Rosebud Indian lands opened to disposition under the act of March 2, 1907, was, under the regulations of January 12, 1909, \$6 per acre for all lands entered during the first period fixed by said regulations, \$4.50 for lands entered during the second period, and \$2.50 thereafter. Where by mistake in description a tract not intended to be taken was included in a homestead entry made during the first period, and the entry

was, before the expiration of that period, amended by elimination of such tract, such erroneous entry will not be considered as fixing the price of the eliminated tract so far as a subsequent entryman is concerned; and the tract having remained open to entry by anyone desiring to take it during the remainder of the first period and during all of the second period, without anyone making entry thereof, the price to be charged an entryman thereafter should be at the then existing rate of \$2.50.

DEPARTMENTAL DECISION MODIFIED.

Departmental decision in the case of John Wahe, 41 L. D., 127, modified.

LAYLIN, *Assistant Secretary*:

Thomas V. Lakin has appealed from decision of July 15, 1912, by the Commissioner of the General Land Office, requiring further payment on his homestead entry at the rate of \$6 per acre instead of the rate of \$2.50 per acre at which price he was permitted to make entry.

The entry was made October 11, 1909, for the SE. $\frac{1}{4}$ of Sec. 35, T. 97 N., R. 76 W., 5th P. M., containing 160 acres, Gregory, South Dakota, land district, under the act of March 2, 1907 (34 Stat., 1230). Commutation proof was submitted October 9, and final cash certificate issued October 21, 1911.

Said tract was formerly embraced in the homestead entry of Henry A. Fulton, which was made April 16, 1909, and amended August 12, 1909, to embrace other land, because the inclusion of the tract here involved was made by mistake. At the time Fulton made entry the price of the land was \$6 per acre, and the Commissioner held that the entry of Fulton, although erroneously made for this land, which mistake was subsequently corrected by amendment to embrace other land, had the effect of fixing the price of this tract at \$6 per acre, and that Lakin should be required to pay at said rate instead of \$2.50 per acre, the price at which he was permitted by the local officers to make entry.

Said act of March 2, 1907, reads in part as follows:

That the price of said lands entered as homesteads under the provisions of this act shall be as follows: Upon all land entered or filed upon within three months after the same shall be opened for settlement and entry, six dollars per acre, and upon all land entered or filed upon after the expiration of three months and within six months after the same shall have been opened for settlement and entry four dollars and fifty cents per acre; after the expiration of six months after the same shall have been opened for settlement and entry the price shall be two dollars and fifty cents per acre. . . . In case any entryman fails to make the annual payments, or any of them, promptly when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry, under the provisions of the homestead law, at the same price that it was first entered.

It was held by the Department in the case of Roy H. Reid (38 L. D., 313), that an inadvertent inclusion of a tract of land in a homestead entry, which was afterward amended to embrace the land

actually settled upon and originally intended to be taken, does not have the effect to fix the price of the erroneously entered tract as of the price prevailing at the time such erroneous entry was made, but that the status thereof remained the same with respect to price as though the erroneous entry had never been made.

In the case of John Wahe (41 L. D., 127), the Department held that, while, by mistake in description, inclusion in a homestead entry of a tract of land not intended to be taken did not have the effect of fixing the price of the tract as of that which prevailed at the date of such entry, yet inasmuch as the erroneous entry segregated the land and prevented entry thereof by other persons, the period of time during which the tract remained so segregated should be eliminated from consideration in determining the price to be charged a subsequent entryman.

The present case is, in all essential respects, practically identical with the case of Wahe. While the decision in the case of Wahe stated correct principles, it is now believed that sufficient consideration was not given to the effect of the instructions, under which these entrymen were acting. Said instructions, dated January 12, 1909 (37 L. D., 393), required all persons holding numbers under 4001, which were given at a drawing, to file their applications at the rate per day specified therein during the period beginning April 1, 1909 and ending May 2, 1909. Thereafter no further entries could be allowed until September 8, 1909, on which date and succeeding dates persons holding numbers above 4000 were allowed, at a certain rate per day, to make entries during the period ending September 30, 1909. It was then provided:

All lands affected by these regulations which have not been entered prior to October 1, 1909, will, on that date, but not before, become subject to settlement and entry by any qualified homesteader, under the general provisions of the homestead laws of the United States and the act of Congress approved March 2, 1907 (34 Stat., 1230), at the price of \$2.50 an acre.

It will thus be seen that the erroneous entry of Fulton segregated the land and prevented entry thereof by anyone else, from April 16 to May 2, 1909, or only seventeen days during the period when the lands would have been otherwise open to entry at the \$6 rate. Fulton's entry was amended on August 12, 1909, and the land here involved was freed therefrom and was subject to entry during the whole period running during that part of the month of September when the \$4.50 rate prevailed. Thus the said erroneous entry of Fulton did not in the least degree interfere with the opportunity of others to make entry at the \$4.50 rate, had anyone desired to do so. Said entry not having interfered with the opportunity of others to make entry at the \$4.50 rate, and no application having been made

at that rate, it is fanciful to assume that the land would have been entered during the first period at the \$6 rate if said entry had not segregated the land during a portion of that period.

It is stated that the land is sandy and that entryman considered it worth \$2.50 per acre and made entry upon the faith of the instructions which appeared to fix the price at \$2.50 per acre after October 1, 1909. It is, therefore, held that the charge should be at the rate of \$2.50 per acre. The decision in the case of Wahe, *supra*, is modified, as indicated herein, and the decision appealed from is reversed.

DON C. ROBERTS.

Decided March 13, 1913.

COAL LANDS—DETERMINATION OF CHARACTER—ADJACENT LANDS.

In determining the character of public lands—whether coal or noncoal—the land department may take into consideration not only surface indications upon the particular land in question but the geological formation of and discoveries upon adjacent or nearby lands.

NONMINERAL ENTRY—IGNORANCE OF MINERAL CHARACTER.

The fact that an entryman under a nonmineral public-land law is so inexperienced as to be unable to recognize existing mineral deposits upon the land, does not warrant the United States in permitting him to take mineral land under a nonmineral entry; and it is not necessary in order to declare a tract mineral in character that personal knowledge of the existence of the mineral deposits be brought home to the entryman, if the presence of minerals be demonstrated.

LAYLIN, *Assistant Secretary*:

December 29, 1903, Joseph Freed made desert land entry 233 for the N. $\frac{1}{2}$, Sec. 9, T. 33 N., R. 12 W., N. M. P. M. [Durango, Colorado, land district], and subsequently assigned the entry to Don C. Roberts. Roberts made final proof thereon October 9, 1906, and final certificate issued the same date. This land, with other lands adjoining, was withdrawn October 10, 1906, from all forms of entry because of its reported coal character and was subsequently classified on June 1, 1910, as coal land, disposable at \$90 and \$95 per acre. Upon charge submitted by a special agent of the General Land Office that the land contained workable and valuable deposits of coal, a hearing was had September 23, 1910, and on May 13, 1911, the register and receiver decided that the land is coal in character, but that the evidence fails to show that it is chiefly valuable therefor, or that claimant knew its character at time of proof and entry; that consequently he was entitled to a patent for the land without reservation of coal to the United States. Upon review of the case by the Commissioner of the General Land Office he held in decision of February 1, 1912, that, while the entry

was made and perfected in good faith, the land is coal in character and subject to the provisions of the act of March 3, 1909 (35 Stat., 844), under which the entryman was required to take patent, subject to the reservation of the coal deposits in the United States. Appeal from said decision brings the matter before the Department.

It appears from the testimony submitted that no evidence of the existence of the coal deposits is apparent upon the surface of the land involved. The land is, however, situate in a synclinal basin, the southern extremity of which is in the vicinity of Gallup, New Mexico, and the northern extremity near Hesperus, Colorado. This basin is underlain by what is known as the Mesa Verde formation, containing several veins of bituminous coal of good quality. At and prior to date of final proof in this case the coal measures in this formation had been opened and mined on Upper Cherry Creek, about ten miles north and east, and at the Hesperus mine, about twelve miles north, as well as at various points to the south in the vicinity of Gallup, New Mexico.

Plate No. 19, Bulletin No. 316 of the United States Geological Survey, forming a portion of the publication, "Contributions to the Economic Geology," published in the year 1907, and introduced in evidence at the trial of this case, shows the land here involved to overlay the Mesa Verde formation.

The witnesses for the United States and for the defendant are agreed that the coal deposits underlie the general area surrounding these lands but disagree as to the depth, the Government expert testifying that, in his opinion, the depth from the surface to the coal under the land in issue is from 300 to 600 feet; the practical miner who testified on behalf of the defendant estimated the depth at about 1,000 feet, while an engineer who appeared for the defendant estimated the depth at approximately 2,000 feet. The testimony for the defense also suggested the possibility that coal might not underlie the particular tract here involved. The entryman, who took the stand on his own behalf, testified that he is not a geologist and knows nothing of coal measures and was unaware of the existence of coal, if there be any, underlying the land.

It is the well-established practice of this Department and has been since long prior to date of final proof upon this entry to take into consideration, in determining the character of land, not only surface indications but the geological formation of and discoveries upon adjacent or nearby lands. This is particularly true with respect to coal deposits whose peculiar formation is of such a bedded or general flat nature and of such wide extent and regularity as to permit the geologist or expert miner to determine its existence under large areas by examination of the geological formation and the characteristics of the coal and its dip as exposed in nearby workings.

Such evidences are abundant in this case and the Department is convinced that the land in question is underlain with valuable deposits of coal at workable depths.

It is contended, however, that the entryman took the desert claim in good faith and that, not being a geologist or miner, knew nothing whatever of its coal character or value. The fact that an entryman who seeks a tract of public land under nonmineral law is so inexpert as to be unable to determine the existence of mineral upon land does not warrant the United States in disposing of mineral lands under nonmineral laws, nor is it necessary in order to declare a tract mineral in character that personal knowledge of the existence of the mineral deposits be brought home to the entryman. In this particular case the land lying as it does in a region well known for its coal deposits, within a few miles of working mines in which the dip of the coal beds was disclosed, was sufficient to charge the public generally with the knowledge of the coal character involved. Whether the entryman had sufficiently exerted himself to acquire this information is immaterial. It was his duty to be familiar with facts of common knowledge and he can not escape the consequences by pleading personal ignorance of facts.

Upon consideration of the entire record the Department concludes that the land is underlain by valuable coal deposits and was known to be chiefly valuable therefor at and prior to date of final desert-land proof October 9, 1906. Such being the facts the entry must be canceled unless entryman chooses to avail himself of the privilege extended by the act of March 3, 1909, *supra*, namely, to take patent which shall reserve to the United States all coal in the land and the right to prospect for, mine and remove the same. The Commissioner's decision is affirmed.

UMATILLA INDIAN LANDS—ACT OF FEBRUARY 11, 1913.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, March 13, 1913.

REGISTER AND RECEIVER,

UNITED STATES LAND OFFICE,
La Grande, Oregon.

GENTLEMEN: Your attention is directed to the act of February 11, 1913 (Public, No. 367), which reads as follows:

That all persons who have heretofore purchased any of the lands of the Umatilla Indian Reservation, in the State of Oregon, and have made or shall make full and final payment therefor in conformity with the acts of Congress of

March 3, 1885, and of July 1, 1902, respecting the sale of such lands, shall be entitled to receive patent therefor upon submitting satisfactory proof to the Secretary of the Interior that the untimbered lands so purchased are not susceptible of cultivation or residence, and are exclusively grazing lands, incapable of any profitable use other than for grazing purposes.

Sec. 2. That where a party entitled to claim the benefits of this act dies before securing a patent therefor, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to make the necessary proofs and payments therefor to complete the same; and the patent in such cases shall be made in favor of the heirs of the deceased purchaser and the title to said lands shall inure to such heirs, as if their names had been especially mentioned.

1. Section 1 of this act is identical in its terms with that of June 29, 1906 (34 Stat., 611), but its provisions are now extended to all entries made prior to February 11, 1913. Proofs may be submitted only after publication and posting of notice, as in ordinary homestead cases. If the regularly introduced testimony shows that a tract is not susceptible of cultivation or residence and is exclusively grazing land, incapable of any profitable use other than for grazing purposes, the entryman is, by the act, relieved of the requirement of residence. Moreover, such proof entitles him to issuance of final certificate, upon payment of the unpaid installments of the price, and it is not necessary to show that the land has been actually used for grazing purposes.

2. Section 2 of the act allows submission of proof by one of the heirs, or by the executor or administrator of the estate of the entryman, if he be dead. However, the certificate is to be issued in favor of the heirs. The executor or administrator, offering proof, must produce record evidence of his appointment, and qualification as such.

FRED DENNETT, *Commissioner*.

Approved:

LEWIS C. LAYLIN,

Assistant Secretary.

CRYSTAL MARBLE QUARRIES CO. v. DANTICE ET AL.

Decided March 14, 1913.

CONTEST—PLACER MINING CLAIMANT AGAINST HOMESTEAD ENTRY—CHARGE.

Where an affidavit of contest by a placer mining claimant against a homestead entry charges that the land in controversy is mineral in character, and contains averments sufficient to apprise the homestead claimant of the nature of the case and to enable him to prepare his defense without danger of surprise, it is not necessary that the affidavit further contain positive averments as to the character of each ten-acre legal subdivision, based upon personal knowledge; but upon trial of the case it will be incumbent upon the mineral claimant to establish the actual discovery or disclosure of

mineral upon each location involved and that the area in conflict is *prima facie* mineral in character, containing placer deposits; and for the purpose of so showing the land to be mineral in character it may be divided into ten-acre subdivisions, and the contest may be sustained as to such ten-acre tracts as are shown to be of such character.

LAYLIN, *Assistant Secretary*:

April 26, 1907, William H. Dantice made homestead entry 18238 (03289) at Spokane, Washington, for the NE. $\frac{1}{4}$, Sec. 34, T. 34 N., R. 38 E., W. M. January 22, 1907, Daniel Alexander McMillan made homestead entry 18101 (03217) for lot 3, Sec. 2, T. 33 N., R. 38 E., and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 35, T. 34 N., R. 38 E.

August 23, 1910, the Crystal Marble Quarries Company, a corporation, filed its application for patent, No. 05932, for certain placer claims, including the Pacific Marble and the Crystal Building Stone. The Pacific Marble embraces the same land entered by Dantice, while the Crystal Building Stone conflicts with the entry of McMillan as to the S. $\frac{1}{2}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 35. After interlocutory proceedings the register and receiver, December 6, 1910, allowed mineral entry for the part of the land not in conflict with the above two homestead entries. By decision of March 21, 1911, the Commissioner held that the application for patent might stand pending proceedings to determine the character of the land and directed that the company be allowed thirty days within which to file applications to contest, under Rule 2 of Practice, the homestead entries to the extent of the conflicts. He further stated:

Under paragraph (d) of Rule 2, there must be a positive averment as to each ten-acre legal subdivision, and the hearing, if held, will be to determine the character, whether mineral or nonmineral, of each ten-acre tract involved.

May 4, 1911, Frank A. Chase, secretary of the Crystal Marble Quarries Company, filed duly corroborated applications to contest both of the above homestead entries, the applications containing similar averments. The essential averments of these applications with respect to the respective conflict areas are as follows:

that said land is mineral in character; . . . that said land is more valuable for mineral than for agriculture; . . . that said company and its predecessors in interest have expended large sums of money in developing said claim and long prior to the purported filing hereinafter mentioned, under the United States homestead laws, had discovered valuable mineral deposits of marble building stone and have for a long time past been engaged in quarrying said building stone; that said land is more valuable for building stone than for agricultural purposes and contains valuable deposits of said building stone; that at all times since said location said locators and their successors in interest and the undersigned have been in actual open possession of said placer mining claim and have been engaged in working and developing the same; that said company has, during all the times herein mentioned owned in addition to the claim herein mentioned, the Russell Placer Claim, the Falls Placer Claim, the Keystone Placer

Claim, and Spokane Placer Claim, and the Crystal Building Stone Placer Ground, and during all the times herein mentioned has worked said claims as a group and the principal quarrying work for said group has been done on the said Keystone Claim, and in addition to such general work on the Keystone Claim for the benefit of all claims, applicant has performed assessment work on the said Pacific and Crystal Claims, all within the knowledge of said claimant under the Homestead Act hereinafter mentioned.

By decision of June 13, 1911, the Commissioner rejected the applications to contest, for the reason that they did not comply with his order of March 21, 1911, and were defective, stating that—

The hearing, if held, will be to determine the character of each ten-acre tract in conflict, and the contest affidavit should be made from personal knowledge, and contain the direct allegation that the lands in conflict, or the portion thereof which it is desired to include in the hearing, are mineral in character.

The company has appealed to the Department.

The Pacific Marble claim was located March 18, 1901, the notice of location being recorded April 24, 1901. The Crystal Building Stone claim was located March 25, 1901, the notice of location being recorded April 25, 1901. Both locations were conveyed to the Crystal Marble Quarries Company March 31, 1906, the deed being recorded April 7, 1906.

Paragraph d of Rule 2 of Practice (39 L. D., 395), requires that an application to contest must contain—

Statement in ordinary and concise language, of the facts constituting the grounds of contest.

In *Yard et al. v. Cook* (37 L. D., 401), the Department held (syllabus):

A protest by a mineral claimant, based upon the alleged mineral character of the land, should set forth the kind of mineral and the character and general situation of the formation claimed by the protestant, as well as any other material matter upon which the respective rights of the parties may be determined.

At page 403 it said:

the Department deems it to be merely consonant with simple principles of legal usage and but fair and just to the party attacked, that the kind of mineral and the character and general situation of the formation claimed by the protestant should be alleged in his protest, as should any other material matter upon which the respective rights of the parties may be determined. What should be so alleged in every conceivable case it is neither practicable nor necessary to specify at this time, as it depends upon the nature of the controversy and of the particular interests involved; but all material and issuable facts should be alleged with sufficient particularity to apprise the challenged party of the definite nature of the case, and enable him to defend without danger of surprise by any fundamental question.

Under the above provisions standing alone it seems apparent that the applications to contest filed by the company are sufficient. The

question remains whether there must be a "positive averment" as to each legal subdivision, that is, as to "each ten-acre tract" involved, based upon "personal knowledge" as required by the Commissioner.

A literal reading of the Commissioner's requirements would compel an actual exposure of the mineral claimed, to wit, marble, upon each 10-acre tract, a requirement which would entail an enormous expense upon the mineral applicant.

In *Union Oil Company* (25 L. D., 351) the Department held that but one discovery of mineral is required to support a placer location, whether it be of 20 acres by an individual or of 160 acres or less by an association of persons. In *Ferrell et al. v. Hoge et al.* (27 L. D., 129), which concerned a nonmineral test filed against a mineral application, the Department held (syllabus):

One discovery of mineral is a sufficient basis for a placer location of one hundred and sixty acres by an association; but if it is subsequently shown that any area of such claim, amounting to a legal subdivision, does not contain, or is not valuable for mineral, such land must be excluded from the entry.

At page 131 it said:

It was conceded in the former decision in this case that there was one discovery of limestone, and, under the present departmental construction of the law, this is sufficient upon which to make a location by the required number of individuals, of one hundred and sixty acres. But, if it is shown that any area amounting to a legal subdivision does not contain, or is not valuable, for the deposit for which the location was made, it is competent for this to be shown by protestants. The burden of proof is, however, on the protestants to show that the parcel attacked does not contain the deposit, and that it is not mineral land within contemplation of the statute.

It is shown by a fair preponderance of the testimony that there is no limestone on the so-called Heel Calk sub-division of the Horse Shoe placer. The mineral claimants offer no testimony that tends to establish the presence of limestone thereon, so far as any development is concerned. They have a theory that it underlies the surface, but this is not sufficient to fix its character.

This ruling was adhered to upon review, *Ferrell et al. v. Hoge et al.* (29 L. D., 12), the syllabus reading in part:

A single discovery is sufficient to authorize the location of a placer claim, and may, in the absence of any claim or evidence to the contrary, be accepted as establishing the mineral character of the entire claim sufficiently to justify the patenting thereof, but such single discovery does not conclusively establish the mineral character of all the land included in the claim, so as to preclude further inquiry in respect thereto.

The entire area that may be taken as a placer claim can not be acquired as appurtenant to placer deposits which are shown to exist only in a portion thereof.

Where a part of the area embraced within a placer entry, in this instance twenty acres, is shown to contain no valuable mineral deposit subject to placer location, such part of the claim will be excluded from the entry.

The question was again considered and the Department's previous decisions affirmed in *American Smelting and Refining Company* (39 L. D., 299), whose syllabus reads:

A single discovery of mineral sufficient to authorize the location of a placer claim does not conclusively establish the mineral character of all the land included in the claim, and the question as to the character of the land is open to investigation and determination by the land department at any time until patent has issued.

In determining the character of land embraced in a placer location, ten-acre tracts, normally in square form, are the units of investigation and determination; and if any such area is found to be nonmineral, it should be eliminated from the claim.

The evidentiary weight to be attached to the actual discovery or disclosure of placer mineral upon one portion of a 160-acre placer claim is dependent upon the character of the deposit and formation, the surrounding geologic conditions, and all the facts and circumstances of the particular case. In the pending case the placer locations and the claimed disclosures of marble were both prior in point of time to the initiation of the homestead claims. It is positively averred that the company is actually engaged in developing and working the marble deposit, and that the land in controversy is "mineral in character" and is "more valuable for mineral than for agriculture." These allegations are supplemented by a showing as to the specific kind of mineral and its character, and altogether the averments are fully sufficient to apprise the homestead claimants of the nature of the case and to enable them to prepare their defense without danger of surprise. The Department is of the opinion that as pleadings the applications to contest are good and sufficient and require no amendment.

Upon the trial of the case, however, it will be incumbent upon the company to establish the actual discovery or disclosure of mineral upon each 160-acre location, and that the area in conflict is *prima facie* mineral in character, containing placer mineral deposits. It can only succeed as to the area shown to be mineral in character, and for this purpose the land may be divided into 10-acre tracts. It is not meant that actual disclosure must be made on each 10-acre tract, but the suggestion is made merely to show that the contest may be sustained as to part of the land only. It is not deemed advisable at this time to go further into the question as to character of proof.

The decision of the Commissioner herein is accordingly reversed and the case remanded for further proceedings in harmony with the views above set forth.

This decision will be carried into immediate effect, and as the decision is interlocutory and not upon the merits, no motion for rehearing will be entertained.

HALL v. CALIFORNIA AND OREGON LAND CO.*Decided March 15, 1913.***FOREST LIEU SELECTION—OCCUPANCY—ABANDONED CABINS, ETC.**

Abandoned cabins, houses, clearing, or other improvements of settlers who once occupied public land and afterwards left it, can not be considered such possession or occupancy as will exclude the land from forest lieu selection under the act of June 4, 1897.

LAYLIN, Assistant Secretary:

The California and Oregon Land Company, by L. R. Edmunson, attorney in fact, appealed from decision of the Commissioner of the General Land Office of April 22, 1912, ordering a hearing upon a contest affidavit of W. G. Hall against a forest lieu selection for lots 3 and 4 and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14, T. 16 S., R. 4 E., W. M., Roseburg, Oregon.

April 28, 1910, W. G. Hall and Jesse W. Rowland each applied for homestead entry of this tract. Hearing was ordered and held before the local office, which, September 2, 1910, found for Rowland. Hall did not appeal. March 15, 1911, that contest closed and Rowland's homestead application was admitted to record.

April 19, 1911, Rowland relinquished his entry, and April 27, 1911, the California and Oregon Land Company, by L. R. Edmunson, attorney in fact, selected the land under act of June 4, 1897 (30 Stat., 36), in lieu of land in the Umpqua Forest Reserve, Oregon, relinquished to the United States. December 28, 1911, Hall filed an affidavit alleging settlement on the land in April, 1910, the building of a house, shed, and outhouses, and establishing of residence; his application for entry and the contest with Rowland, above mentioned, and result thereof; that he had lived on the land from a day in April, 1910, not stated, to a day in November, 1910, not stated. The affidavit then proceeds:

That at the time the said lieu selection was filed I was still the owner of the said improvements on said land, and have never parted with my title to the same, and was claiming the same as my homestead, and the said California and Oregon Land Company must have seen the said improvements and must have known of my claim to said land. That I have been approached several times to file a relinquishment to the said land, but have refused at all times to do so. That the value of my improvements on the said land is about \$250.00. That I settled on the said land, and have claimed the same, and made improvements thereon, and am still claiming the same in good faith, to make a home for myself and family.

This affidavit is as significant for what is not said as for what is said. A contest affidavit, like a pleading, should state facts entitling the plaintiff to recover, or, as is ordinarily expressed, should state a cause of action. This affidavit does not allege that at any time after November, 1910, did Hall assert right to the land, until the filing of

this affidavit, or that he ever visited it. For all that appears, in November, 1910, he abandoned the land, and has never returned to or asserted any claim to it, or exercised any dominion over it, until the filing of this affidavit.

It is not every construction, house, or cabin that amounts to an occupancy, or a possession. Defined rights of occupancy in the nature of easements, granted and protected by statute, are not such possession of the land as prevents its selection under act of June 4, 1897, *supra*. James M. Miller, 32 L. D., 311, 312. Nor can abandoned cabins, houses, clearing, or other improvements of settlers who once occupied public land and afterwards left it, be considered a possession or occupancy which excludes such land from selection under the act. Improvements are presumptive notice to any one seeking to acquire rights in land of the rights asserted by the owner of such improvements, but it is well known that many improvements made by *bona fide* settlers are afterwards abandoned and permitted to fall into decay. The mere fact that a settler was formerly on the land, and when he left it, abandoned his improvements, is not notice of an existing right. In the present case there had been a contest. The right of possession and entry had been adjudged to Rowland, the adverse claimant. Accepting all that is stated in the affidavit as true, from November, 1910, to the last of April, 1911—a period of six months—Hall asserted no right. The cabin may have stood there, but it was tenantless, and two months before Hall abandoned it the right of entry and possession had been adjudged to Rowland. The land office record from September, 1910, to the last of April, 1911—a period of eight months—if consulted by one desiring to appropriate the land, would have shown that Hall had no right to it, and in November, 1910, Hall acquiesced in that judgment, and left the land. No constructive possession could arise from the existence of an abandoned cabin under such circumstances.

Under the somewhat similar act of June 3, 1878 (20 Stat., 89), which excludes occupied lands from entry under the timber and stone act, the Department held in *Andrew v. Stuart*, 31 L. D., 264, that old excavations or unoccupied cabins, situated on abandoned mineral locations, are not such mining or other improvements as excepted land from purchase under the timber and stone act.

The affidavit, therefore, does not allege a possession or occupancy of the land at the time selection was made. The selector surrendered to the United States an apparent good title of an equal area of land, which the United States desired to acquire, and for which it offered an exchange. For all that appears from the affidavit, the land selected was vacant, open to homestead entry, unoccupied, and unclaimed. No cause of action was therefore stated.

The decision is reversed.

HALL v. CALIFORNIA AND OREGON LAND CO.

Motion for rehearing of departmental decision of March 15, 1913, 41 L. D., 647, denied by Assistant Secretary Laylin, May 8, 1913.

STATE OF UTAH.

Decided March 15, 1913.

CAREY ACT SEGREGATIONS—UNSURVEYED LANDS—DESCRIPTION.

In the segregation of unsurveyed lands under the Carey Act it is not necessary that entire townships be selected or that the outer boundaries of the withdrawn areas be marked and defined on the ground by artificial posts or monuments; it is sufficient if the tracts of unsurveyed lands be designated by a metes-and-bounds description connected at some point with a bearing to a corner of the public surveys, a monument, or a natural object in the neighborhood, supplemented by a statement of the probable section, township, and range in which they will fall when surveyed.

LAYLIN, Assistant Secretary:

On March 23, 1912, the State of Utah filed its application for segregation, under the act of August 18, 1894 (28 Stat., 372), commonly known as the Carey Act, of approximately 166,000 acres of land near Grand River, Utah, proposed to be reclaimed through the construction of a diversion dam in Grand River, and a system of irrigation canals conveying water to lands on either side of the river. Acting under instructions given by the Commissioner of the General Land Office, May 1, 1912, the register and receiver rejected the application for segregation as to certain lands lying within petroleum reserve No. 25, established by executive order of March 4, 1912; as to the S. $\frac{1}{2}$ S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 35, T. 21 S., R. 16 E., because of conflict with mineral entry 3839; as to all lands applied for in townships 20 south, ranges 14, 15 and 16 east, township 23 south, range 13 east, township 24 south, range 16 east, and 160 acres in township 22 south, range 14 east, because the lands are unsurveyed, and because the State did not embrace in its application all lands in the respective townships; and as to all lands in township 24 south, range 16 east, for the additional reason that lands therein along Grand River are covered by power site reserve No. 42. Upon appeal by the State from said rejection on all points except the tract in conflict with the mineral entry, your office on August 9, 1912, affirmed the action of the register and receiver. Appeal from said decision brings the case before this Department and in the report accompanying the appeal you state that you have modified your holding as to the lands embraced in the petroleum reserve and allowed the State an opportunity to amend and present its application for such lands under the provisions of the act of August 24, 1912 (37 Stat., 496); that pursuant to this modification the State is now engaged in preparing amended list as to such lands. This leaves for decision by the Department so much of your decision and the appeal

therefrom as relates to the application for the segregation of unsurveyed lands and those lands in alleged conflict with the power site reserve.

Your action in rejecting so much of the application for segregation as embraced unsurveyed lands, described by sections or parts of sections, township and range, was based upon paragraph No. 5, of regulations under the Carey Act, approved April 9, 1909 [37 L. D., 624], upon general instructions relating to applications and selections for unsurveyed lands, of November 3, 1909 (38 L. D., 287), and upon departmental decision of October 6, 1911, in the case of F. A. Hyde *et al.* (40 L. D., 284). The Carey Act regulation above referred to is to the effect that when a township has not been subdivided but has had its exterior lines surveyed, the entire township may be selected, omitting, however, school sections; that when the records are in such condition that proper notations may be made, a part of a section of unsurveyed lands may be selected, but that no patent shall issue until the land has been surveyed.

The general instructions of November 3, 1909, *supra*, do not relate or refer specifically to selections under the Carey Act but in substance recite that in order to avoid confusion and uncertainty arising from applications, selections, and filings upon unsurveyed public land, any such applications must describe the lands by metes and bounds with reference to monuments by which the location of the tract on the ground can be readily ascertained. It is stated that such monuments may be of iron, stone or substantial posts, or of trees or natural objects of a permanent nature; that the land must be rectangular in form if practicable and that the approximate description of the land by section, township and range, as it would appear when surveyed, must also be furnished.

The decision in the case of F. A. Hyde *et al.*, *supra*, in so far as it relates to the selection of unsurveyed lands, is substantially to the effect that an application to make a forest lieu selection of unsurveyed lands does not constitute notice to intending settlers unless the claim has been so marked and identified upon the ground as to indicate that a claim therefor is asserted.

The purpose of the Carey Act is to grant to certain States named therein such desert lands within their boundaries, not exceeding a specified acreage, as the States shall cause to be thoroughly irrigated and reclaimed. In order that the State may have opportunity to construct the necessary reclamation works and meet the conditions imposed by the grant as a prerequisite to patent, the law authorizes the segregation or withdrawal of the lands proposed to be irrigated, for a period of ten years, which time may be, within the discretion of the Secretary, extended for an additional five years. By the very necessities of the case such withdrawals are of compact and contiguous bodies of land,

as nearly as may be, lying in such position that irrigating canals may be constructed along their outer and higher boundaries, from which laterals leading down to and through the land, convey water upon it for irrigation. In this particular instance the application for segregation does not include a large number of widely separated and non-contiguous small tracts but, in so far as the lay of the land and prior disposals permit, are in compact areas. The Department does not understand that any of the regulations referred to require, or were intended to require, that each 40-acre legal subdivision or quarter section sought to be segregated under the Carey Act be actually surveyed out and monumented upon the ground as a prerequisite to segregation.

As pointed out, the lands are usually applied for in compact areas, and in addition the fact that a project is under way is generally a matter of common knowledge within the vicinity, so that the possibility of the initiation of settlement claims upon unsurveyed segregated lands without knowledge of the segregation and proposed reclamation, is not probable. Furthermore, when construction begins the location of the irrigation works, and particularly of the canals and laterals, is such as to charge intending settlers with notice of the contemplated irrigation of the lands lying below the canals.

Withdrawals or segregations under the Carey Act may be treated substantially as are withdrawals of public lands in connection with power sites, withdrawals for classification or other purpose under the act of June 25, 1910 (36 Stat., 847). In those cases the outer boundaries of the withdrawn areas are not marked and defined on the ground by the setting of artificial posts or monuments; but in the case of unsurveyed lands so withdrawn they are designated by a metes-and-bounds description connected at some point with a bearing to a corner of the public surveys, monument or natural object in the neighborhood, this description being also supplemented with a statement of the approximate section, township and range in which it is believed they will fall when surveyed. Such a description will serve all requisite purposes in connection with Carey Act withdrawals. The description in the segregation list presented by the State of Utah does not, however, conform to these requirements, merely designating the lands sought as unsurveyed section —, township —, range —.

The decision of the Commissioner is accordingly modified and the State will be advised that, upon the amendment of its application for segregation so as to describe each tract of unsurveyed land therein by metes and bounds, connecting the tracts so described by a bearing by course and distance to the nearest corner of the established public-land surveys, or some natural object or monument, supplemented by a statement of the probable section, township, and range when sur-

veyed, the application for segregation will be given further consideration with a view of its allowance, in the absence of other objection.

With respect to the rejection of the list as to lands in township 24 south, range 16 east, because of the existence of power site reserve No. 42, covering certain lands therein, it is alleged by the State that there is in fact no conflict between the segregation list and the power site reserve, for the reason that the power site withdrawal applies only to lands within one quarter of a mile of Grand River, while as a matter of fact, none of the lands in the State list approach that near the river. According to the records of the Department power site withdrawal No. 42 embraces "every smallest legal subdivision in the following townships, any portion of which lies within one quarter of a mile of Grand River," and among the townships to which the order applies is 24 south, range 16 east. It would appear that when the application for segregation has been amended, as hereinbefore directed, to describe the unsurveyed lands by metes and bounds, it will be possible for the General Land Office to ascertain from the maps and lists, or from field examination, whether any of the lands sought by the State are covered by said power site reserve No. 42. The Commissioner's decision with respect to this township is accordingly modified and he will proceed to ascertain whether or not any of the lands applied for in section 24 south, range 16 east, actually conflict with the power site withdrawal; if not, the segregation may be allowed, in the absence of other objection. If conflicts are found, the application for segregation should be rejected to that extent.

It is the purpose of the Department to, in this decision, dispose only of the questions presented by the appeal of the State and to reserve its decision upon all other matters pertaining to the proposed segregation until the amendment of the list herein authorized, until the completion of the field examination of the project, now under way, by a special agent of the General Land Office, and until all other matters pertaining thereto have been considered and appropriate recommendations made to the Department.

MYRON W. KYRE.

Decided March 15, 1913.

SECOND DESERT LAND ENTRY—ACT OF FEBRUARY 3, 1911.

The initial payment of twenty-five cents per acre required of a desert land entryman at the time of filing his application is within the term "filing fees" as used in the act of February 3, 1911; and the fact that an entryman received for his relinquishment the amount of such initial payment does not disqualify him to make second desert land entry under that act.

LAYLIN, *Assistant Secretary:*

Appeal is filed by Myron W. Kyre from decision of March 8, 1912, of the Commissioner of the General Land Office, holding for cancel-

lation his second desert land entry made November 8, 1911, for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 13, T. 1 S., R. 16 E., Hailey, Idaho, land district, for the stated reason that he had received upon relinquishment June 26, 1908, of his former desert land entry made September 22, 1905, for the NE. $\frac{1}{4}$, Sec. 19, T. 1 N., R. 19 E., same land district, the sum of \$12.50, as stated in his affidavit accompanying his second application.

The act of February 3, 1911 (36 Stat., 896), providing for second entries, specifies that said act shall not apply to any person whose former entry was relinquished for a valuable consideration in excess of the filing fees paid on such entry.

An entryman making a desert land entry is required to pay 25 cents an acre with his application. This constitutes a filing fee within the purview of said act as to second entry. The case is analogous to that of payment required to be made with a homestead application for former Indian lands, which was held by the Department in the case of *Goodale v. Morris* (41 L. D., 420), to be within the category of filing fees as specified in said second entry act. This case is governed by the Department's decision in that case.

The decision appealed from is accordingly reversed.

PAUL B. WARNEKROS.

Decided March 15, 1913.

MINING CLAIM—ADVERSE POSSESSION—SECTION 2332, R. S.

It is not necessary to entitle a mining claimant to patent under section 2332,

Revised Statutes, that such claimant shall *personally* have been in adverse possession of the claim for the period fixed by that section; it is sufficient thereunder that the claimant *and his grantors* shall have held and worked the claim for such period.

LAYLIN, *Assistant Secretary*:

This is an appeal by Paul B. Warnekros from the decision of the Commissioner of the General Land Office, of February 6, 1912, holding for cancellation, to the extent of the Last Chance lode mining claim, his mineral entry 011274, made December 19, 1910, for that and other lode mining claims, survey 2789, situate in Cochise County, Phoenix land district, Arizona.

By decision of December 9, 1911, the Commissioner found and held that:

claimant appears to base his title to the Last Chance lode upon possessory rights under section 2332, U. S. Revised Statutes. Inasmuch, however, as the abstract of title shows the derivation by him of a one-eighth interest in said (Last Chance) location as the grantee of Nellie Cashman, grantee of J. E. Power, who was the grantee of the whole interest of the locator, John M. Collins, adverse possession and the statute of limitations will not run against co-owners who derived their title through the same channel as did Nellie Cashman.

The claimant was accordingly required to furnish evidence of record title to the Last Chance lode or show cause why the entry should not be canceled, to the extent thereof.

In response to this requirement, the claimant submitted a certified copy of a judgment rendered February 16, 1883, in the case of Patrick McMahan *v.* John M. Collins, involving the Last Chance claim, which judgment, considered in connection with the abstract of title comprising a part of the record in the present case, showed that Nellie Cashman took nothing by virtue of the purported conveyance from Powers and that whatever interest she had in the claim was acquired otherwise than by any instrument of conveyance of record. Upon considering this showing, the Commissioner, in the decision here appealed from, found and held that:

The abstract shows that Nellie Cashman was a co-owner, in 1909, in the Last Chance lode, and that, on November 20, 1909, Warnekros receipted to her for her share of assessment work for the years 1895 to 1909, amounting to \$175 and representing a one-eighth interest for those years. Payment was made to Warnekros himself and receipted for by him. This receipt is entirely inconsistent with the claim of Warnekros that he has had exclusive and adverse possession of the claim for the statutory period of ten years.

The entry, as to the Last Chance claim, was accordingly held for cancellation.

It is to be noted that Warnekros did not assert in his application an exclusive, adverse possession of the claim by himself alone, during the period covered by the statute of limitations of the State of Arizona, in which the claim is situated, but that he "and his grantors and predecessors in interest" have continuously held possession of and worked the claim for such period. Nellie Cashman is alleged, in the application, to have entered into adverse possession of the claim, in conjunction with several others, as early as 1890, and she would seem, from the disclosures made elsewhere in the record, to have maintained such possession jointly with Warnekros and others until December 7, 1909, when she conveyed her interest in the claim to one M. J. Cunningham who, in turn, on May 24, 1910, conveyed the same to Warnekros.

Section 2332, Revised Statutes, under which the application is filed, does not require that adverse possession shall be continuous in any one person, but provides that a "person or association, *they* and their *grantors*," who have held and worked a claim for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory wherein the same may be situated, shall be entitled to a patent upon the submission of "evidence of such possession and working of the claims for such period." The mere fact, therefore, that Warnekros recognized Nellie Cashman as a

co-claimant to the ground embraced in the Last Chance lode during the period from 1895 to 1909, in no wise affects his right to a patent to the claim, under the provisions of section 2332, Revised Statutes.

The decision appealed from is accordingly reversed and the case remanded for further and appropriate action.

STANISLAUS ELECTRIC POWER CO.

Decided September 4, 1912.

PLACER MINING CLAIM—LOCATION BY CORPORATION.

A corporation, regardless of the number of its stockholders, may lawfully locate no greater placer area under the mining laws than is allowable in the case of an individual, namely, twenty acres.

PURPOSE OF MINING LAWS.

It is the purpose of the mining laws to reserve from disposition and to devote to mineral sale and exploitation only such lands as possess mineral deposits of special or peculiar value in trade, commerce, manufacture, science, or the arts.

BUILDING STONE LOCATION—ACT OF AUGUST 4, 1892.

The act of August 4, 1892, authorizing the location of land chiefly valuable for building stone under the placer mining laws, applies only to deposits of stone of special or peculiar value for structural work, such as the erection of buildings, and such other recognized commercial uses as demand and will secure the profitable extraction and marketing of the product; and has no application to the vast deposits of low-grade rock in the public domain which possess no special or peculiar value for structural purposes, and are useful only for rough work in the immediate vicinity.

MINERAL APPLICATION—GOOD FAITH.

In passing upon a mineral application for patent, the good faith of the applicant and the use to which he has devoted or may intend to devote the land is a proper element for consideration by the land department as incidental to, and throwing light upon, the real value and character of the land.

STIPULATION BY SPECIAL AGENT.

The Department can not recognize as binding upon it any stipulation entered into at a hearing by special agents and attorneys for the parties in interest which may preclude the consideration in the case of any question vital to the validity or regularity of the claim involved.

SHOWING REQUIRED BY APPLICANT FOR PATENT OR ENTRYMAN.

It is incumbent upon an applicant for patent or entryman to submit such evidence as may be required by law, regulations, or ruling of the land department, to show that the land is of the character subject to his claim, and that he has complied with the law and regulations with respect thereto.

ADAMS, *First Assistant Secretary*:

March 1, 1906, Winfield Dorn, G. M. Murphy, and B. E. Westervelt located the Eagle placer mining and building stone claim, alleging the land to be chiefly valuable for building stone. October 25, 1907, they conveyed same to the Stanislaus Electric Power Company, a corporation.

April 15, 1908, the company, by E. E. Carpenter, its attorney in fact, filed application for patent for the said claim, described as the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 24, T. 4 N., R. 16 E., and lot 3, Sec. 19, T. 4 N., R. 17 E., M. D. M., Sacramento, California, serial No. 0116, containing a total area of 41.63 acres.

The application for patent alleges that the claim is chiefly valuable for building stone. It was accompanied by the affidavit of the agent of the company, wherein it is stated that the land included within the application—

is almost wholly composed of ledges of unstratified, extremely hard rock, which is a species of granite, which contains no trace of any valuable metal. Said stone is valuable for building stone for use as foundations of buildings, walls, abutments, and is valuable for use where strong rough work is required; that there is upon said claim no timber or other vegetation of any value, except as follows: scattering pine and oak trees upon the said flat and upon the rocky slopes of the canyon; the soil being composed of sand, the residue of granite decomposition, and not valuable for agriculture; that the middle or main fork of the Stanislaus River passes over and through said land, and that the quantity of water in said river varies from 5,000 miners' inches of low water to 500,000 miners' inches during the season of the highest water.

The claim is within the exterior limits of the Stanislaus National Forest, and a protest against the building-stone application was filed by the Forest Service, Department of Agriculture. April 9, 1909, the Commissioner of the General Land Office issued citations for a hearing, upon the following charge, based upon the reports of forest officers:

That title to the land embraced within the said Eagle placer stone claim is not being sought in good faith for mining purposes, but for water-power purposes.

Hearing was had upon this charge and on consideration of the record the register and receiver, August 12, 1910, recommended a dismissal of the proceedings, finding, in substance, that the burden of proof rested upon the Government; that the entry should not be canceled except upon a clear preponderance of evidence showing fraud, and that the evidence fails to afford ground for such action, but, on the contrary, shows that contestee acted in good faith and used and contemplates the use of the stone upon the claim in the construction of dams, ditches, etc. March 11, 1911, the Commissioner of the General Land Office reversed this recommendation, and held the application for rejection, on the ground that the evidence shows the main purpose of the company is to secure the land for use in the development of electrical power through diversion of the water of the Stanislaus River at that point; that the principal value of the land is for a water-power site, and that the value of the stone is incidental merely to this power development, without which it has no appreciable value. The Commissioner concluded that the title to the land

is not being sought in good faith for mining purposes, but for water-power purposes, and therefore held the mineral application for rejection.

Appeal from this latter decision brings the case before this Department.

The circumstances attending the location indicate, the evidence given at the hearing shows, and counsel for the company admit that the location made by Dorn *et al.* was in the interest and for the benefit of the Stanislaus Electric Power Company.

The placer mining laws expressly limit the area which a single individual may embrace in a location to not exceeding 20 acres, and this Department and the courts have held that a corporation, regardless of the number of its stockholders, may lawfully locate no greater area under the placer mining laws than is allowable in the case of an individual. Igo Bridge Extension Placer (38 L. D., 281); Gird *et al. v.* California Oil Company (60 Fed., 531); Durant *v.* Corbin (94 Fed., 382); Cook *et al. v.* Klonos *et al.* (164 Fed., 529). Consequently, the location upon which this application is based is invalid, at least as to the excess above 20 acres.

Title is sought under the specific provisions of the act of Congress approved August 4, 1892 (27 Stat., 348), which provides:

That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: *Provided*, That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

Two points of difference exist between this act and the general mining law applicable to mineral deposits:

(1) That the act of 1892, *supra*, requires the lands to be "chiefly" valuable for building stone, and

(2) That lands though chiefly valuable for building stone are not to be withheld or excluded from reservations or donations for school purposes or to States.

The evidence submitted shows that the deposit of stone upon this claim is of a low grade of granite, suitable, as stated in the affidavit accompanying the application for patent, for strong rough work in foundations, walls, and abutments; that the deposit is not confined to the land applied for but that it exists for miles in every direction.

The formation in question is shown by Folio No. 51 of the Geological Survey series—geology of the Big Trees Quadrangle—to underlie approximately two-thirds of that quadrangle. In fact, geological surveys show that granitic rocks are widely distributed in eastern and northern California, comprising approximately three-fifths of the area of the Sierra Nevadas. It is not alleged by applicant that this deposit of stone possesses particular or peculiar value

as a building stone, or that it is susceptible of or valuable for any use other than that described as rough work. This is supported by the testimony submitted both by the Government and the defendant, such testimony, however, being meager.

It appears from the record that the defendant company's principal business is the development, transmission, and disposition of hydro-electric power, and that within the limits of this claim the company has constructed a diversion dam, which diverts the water of the Stanislaus into a flume or ditch, which, in turn, conveys it to a reservoir some 15 miles below, where it is utilized in a power plant belonging to the company for the purpose of generating electricity. The evidence indicates that the company has another project under contemplation, i. e., to take water out of the river some distance above this claim, convey it by means of a ditch or flume to a power house to be located upon this claim or in its vicinity, and thereafter to convey the water through the flume first mentioned to the existing power house below.

The nearest railroad to the placer claim is about 35 miles distant, and there is no nearer market for stone. No attempt has been made by the company to market any of it, and its only use has been in the construction of the diversion dam and of the intake at the head of the flume first described. In fact, the testimony of defendant indicates that the purpose of the location was to secure stone for construction in connection with the power development.

The evidence submitted as to the value of the land in the placer claim for a power-development site is meager and somewhat unsatisfactory, but it is admitted that within the limits of the claim is a flat or level area which could be utilized to advantage for a power house and other structures in connection therewith. It is true that the only witness for the defendant intimates that other locations for a power house might be found along the river, but I am satisfied from the evidence submitted and from the location of the structures already built and being utilized by the company, that this particular tract of ground is an advantageous and desirable site for a power house and other structures, and in fact is, because of the topography, especially valuable both for a dam site and a power-house site, being so situated as to provide the best natural division of the stream into power units.

In the case of *Conlin v. Kelly* (12 L. D., 1), this Department held that stone useful only for general building purposes was not subject to appropriation under the mining laws. The character of the material there considered was—

a ledge of unstratified, extremely hard, flesh-colored rock, a species of granite, which contains no trace of any valuable metal. It is a common stone in South Dakota, is of some value as a building stone, being used for foundations of buildings, cellar walls, bridge abutments, and other places where strong rough work is required.

Following this decision the act of August 4, 1892, *supra*, was passed, the House Committee on Public Lands in its report upon the bill, referring to the Conlin *v.* Kelly case, stating that the object of the proposed law was to direct that building stone be included within the definition of the term "mineral."

In the case of McGlenn *v.* Wienbroeër (15 L. D., 370), decided October 12, 1892, the Department, after referring to Conlin *v.* Kelly, stated that an act was approved August 4, 1892, "which would allow the entry of lands such as are described in the Conlin case under the placer mining laws."

It will be noted that defendant company in its proofs accompanying the application for patent has, in describing the deposit of stone upon this claim, followed almost literally the description of the deposit involved in the case of Conlin *v.* Kelly.

The issue raised in the notice for hearing attacks only the good faith of the applicant and does not directly raise the question of the value of the deposit of stone or its enterability under the act of 1892, *supra*. However, this is a question which it is the duty of the Department to determine in this and other cases of application to enter lands, whether the record presented is the result of a hearing had or whether it be the *ex parte* presentation of the case by the mineral claimant in its application for patent. The good faith of the applicant and the use to which he has devoted or may intend to devote the land is a proper element for consideration as incidental to, and throwing light upon, the real value and character of the land sought.

As hereinbefore indicated, it is apparent that the company is already using a portion of this land in the development of hydro-electric power, and the facts strongly tend to show that it is to be further utilized in connection with the development of additional power. No use has been made of the deposit of stone upon the claim, except in connection with the power development; no demand or market for the same is shown to exist outside of this power development and the character of the stone is shown to be such that its extraction and removal to distant points would be unwarranted and unprofitable.

The avowed purpose of the general mining laws was to promote and encourage the development of the mineral resources of the United States, and the conditions imposed by the mining laws upon locators and applicants for patent were designed to secure preliminary development at least of such resources.

While, as stated by the Supreme Court of the United States in *United States v. Iron Silver Mining Company* (128 U. S., 673), the fact that land may possess incidental advantages other than its

valuable mineral deposits will not preclude its disposition under the mining laws, yet it is the undoubted purpose of those laws, which should be enforced by this Department so far as possible in its disposition of the public lands, to insure the extraction and exploitation of mineral deposits rather than the primary nonmineral use of the lands. Furthermore, it is the undoubted purpose, intent, and scope of the mining laws to reserve from other disposition and to devote to mineral sale and exploitation only such lands as possess mineral deposits of special or peculiar value in trade, commerce, manufacture, science, or the arts. Stone of such character as may be used in building foundations, fences, abutments, or other rough work is widely distributed, not only through California and the States containing public lands, but throughout the eastern States. It can not be contended that land from which stone is removed by the farmer in the course of his agricultural operations, which stone he may utilize in constructing fences or in rough work upon his farm, is mineral land, or that his farm is a mine within the meaning of the general mining laws or of the act of August 4, 1892.

The Department is convinced that said act, as it permits the entry of lands chiefly valuable for stone, under the placer mining laws, was intended to and does apply only to deposits of stone of special or peculiar value for structural work, such as the erection of houses, office buildings, and such other recognized commercial uses as demand and will secure the profitable extraction and marketing of the product. The deposit herein involved is clearly not of this nature, as hereinbefore shown. It has no commercial value. It could not be transported and marketed at a profit. Its only use is that stated in the application for patent, and to which it has been devoted by the applicant company, simply to the extent of its power-development needs upon the claim itself or in the immediate vicinity.

It is not intended to hold that such forms of granite as that described in the case of *Northern Pacific Railway Company v. Soderberg* (188 U. S., 526), which involved a deposit of granite susceptible of, and which was being quarried and disposed of for, structural purposes at a profit, is not enterable under the mining laws, but it is held that the vast deposits of low-grade rock in the public domain which possess no special or peculiar value for structural building purposes is not subject to disposition under the placer mining laws and the act of August 4, 1892, *supra*.

That the deposit upon this claim is of the character last described is shown not only by the statement of the applicant company in its application for patent and accompanying papers and by the evidence submitted, but by the disclosed fact that the company is utilizing and designs to utilize the land for another purpose, viz, the development of hydroelectric power.

Considering the entire record, the Department is convinced that it is shown and established that the land is not chiefly valuable for building stone, and as a consequence is not enterable under the act of August 4, 1892, *supra*. The pending application will therefore stand rejected, and the decision appealed from is affirmed.

It is noted that the special agent representing the United States and the attorney representing the defendant orally stipulated or agreed at the hearing that no question arises as to the sufficiency of the expenditures made upon the claim by applicant company, and this so-called stipulation is referred to in appellant's brief. This Department can not recognize the binding force upon it or upon the Commissioner of the General Land Office of any stipulation entered into at a hearing by special agents and attorneys for parties in interest which may preclude the consideration in the case of any question vital to the validity or regularity of the claim. The fact that the question may not be in issue through the charges made or evidence adduced at the hearing does not warrant any such stipulation or preclude the Department from requiring of applicants or entrymen such proofs or evidence in support of their claims or entries as may be required or necessary under the law and regulations applicable.

Considerable discussion of the question of burden of proof occurs in the briefs and arguments submitted in this case. Whatever may be said of the practice or rule of the Department in this respect, the fact remains that it is in every case incumbent upon an applicant for patent or entryman to submit such evidence as may be required by the law, regulations, or ruling of the Department in order to show that the land is of the character subject to his claim, and that he has complied with the law and regulations with respect thereto.

The General Land Office will in future be governed by the views as to stipulations and proof above expressed.

STANISLAUS ELECTRIC POWER CO.

Motion for rehearing of departmental decision of September 4, 1912, 41 L. D., 655, denied by Assistant Secretary Laylin, May 2, 1913.

WILLIAM S. McCORNICK.

Decided March 3, 1913.

COAL LANDS—DEPARTMENTAL REGULATIONS.

Section 2351 of the Revised Statutes specifically authorizes the Commissioner of the General Land Office to issue all needful rules and regulations to carry the coal-land laws into effect; and applicants and entrymen under such laws are charged with knowledge of the existence of regulations issued pursuant to such authority.

EFFECT OF FAILURE TO MAKE PROOF AND PAYMENT WITHIN TIME.

Failure of an applicant to purchase under the coal-land laws to make proof and payment within thirty days from the conclusion of the publication of notice of his application, as required by the regulations, subjects the application to rejection; and an entry erroneously allowed upon proof submitted after the thirty-day period is subject to cancellation.

VALUATION OF COAL LANDS—DIRECTOR OF GEOLOGICAL SURVEY.

The valuation of coal lands and deposits by the Director of the Geological Survey, or other agency, under authority of, and in accordance with, rules and regulations of the land department, is in effect a valuation of such lands and deposits by the head of that department.

REAPPRAISEMENT OF COAL LANDS—PRICE REQUIRED OF APPLICANT.

Where an applicant to purchase coal lands failed to make proof and payment therefor within thirty days from the conclusion of the publication of notice of his application, as required by the regulations, and, prior to the tender of proof of purchase money by him, the price of the land applied for had been increased, the applicant will be required to pay the price existent at the time he actually consummates the purchase by paying the money into the local land office.

ADAMS, *First Assistant Secretary*:

January 16, 1911, William S. McCornick filed application to purchase the NE. $\frac{1}{4}$, Sec. 22, T. 17 S., R. 7 E., Salt Lake City, Utah, land district, under the provisions of section 2347, Revised Statutes. Notice of the application to purchase was given by publication and posting from January 28 to February 27, 1911, proof of publication being filed in the local land office April 8, and proof of continuous posting of notice on the land April 11, 1911. April 4, 1911, the claimant paid \$4,000 at the rate of \$25 per acre for the land and receiver's receipt 585194 issued. July 13, 1911, the register of the local land office, on recommendation of the chief of field division, General Land Office, issued final certificate of entry 07078.

The land involved was classified by letter of the Commissioner of the General Land Office of July 3, 1907, as coal land disposable at \$25 per acre, and reclassified and revalued by Commissioner's letter of March 18, 1911, disposable at the following prices: NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, \$135 per acre; NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, \$122 per acre; SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, \$117 per acre; NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, \$130 per acre. Upon consideration of the entry and of the classification and valuation put upon the land the Commissioner of the General Land Office on November 14, 1911, allowed applicant to show cause why his entry should not be canceled because of failure of the applicant to make final proof and payment within the time prescribed by the coal land regulations; also holding that applicant must be required to pay the higher valuation placed upon the land by Commissioner's letter of March 18, 1911, as a prerequisite to the allowance of a new application to purchase the land under section 2347, Revised Statutes. Appeal from said decision brings the case before the Department, error being alleged substantially in

holding that the failure to make proof and payment within the time prescribed by the regulations required the cancellation of the entry and in holding that the reappraisal of March 18, 1911, necessitates or requires the payment by the present applicant of the higher price fixed upon the coal deposit.

It is urged that the requirement that proof and payment be made within thirty days from conclusion of the publication and posting of notice is but a regulation which should in this case be waived by the Department to permit the completion of the entry and the reappraisal made after the filing of the application to purchase and the giving of notice thereof should not affect applicant's right to acquire the land at the former price of \$25 per acre.

In connection with the appeal it is urged that the reappraisal in this case was made by the Director of the Geological Survey and that such reappraisal is without force because the appraisal, if any, should be made by the Secretary of the Interior. In a supplemental brief filed it is urged that applicant should be given a patent on the entry as allowed and upon the \$25 per acre paid, because he should not be charged with knowledge of the regulations governing applications to purchase coal lands; that the coal land statutes did not specifically prescribe the time within which the proofs must be filed and payment made in such cases; and that the fact that the regulations so required was unknown to Mr. McCornick.

The Department can not admit the force of the contentions made. Section 2351, Revised Statutes, a portion of the coal land laws, specifically authorizes the Commissioner of the General Land Office to issue all needful rules and regulations for carrying the law into effect. Such rules and regulations have, therefore, legal foundation, their effectiveness is not open to question, and applicants and entrymen are necessarily charged with knowledge of their existence. Furthermore, the particular regulation here involved (paragraph 18 of the coal land regulations) was approved by the Commissioner of the General Land Office and the Secretary of the Interior November 30, 1907, and promptly promulgated. Applicant must, therefore, be held to have been charged with constructive knowledge of the requirements of said regulations, which are that coal land applicants must within 30 days after the expiration of the period of newspaper publication, furnish proof and tender the purchase price of the land and that in event of failure so to do the applications shall be rejected by the local officers. In this case, the proofs were not submitted nor the purchase money tendered within 30 days after the expiration of the period of newspaper publication, and the action of the Commissioner of the General Land Office in holding for cancellation the entry erroneously allowed by the local officers was correct. In the interim the Commissioner of the General Land Office promulgated

the reappraisal of the lands involved, increasing the price per acre, as hereinbefore described. That this valuation was based upon the recommendation or finding of the Director of the Geological Survey and was not directly approved by the Secretary of the Interior affects in no sense its force or regularity. The Commissioner of the General Land Office is charged by law with the administration of the coal land act and may adopt such recommendations of other governmental officers as he may deem advisable. His action is subject to the supervisory authority of the Secretary of the Interior.

The practice of appraising and reappraising coal deposits in public lands as a basis for their disposition under the coal land act, has been in vogue at least since April, 1907, and the duty of ascertaining the valuation of the coal lands has been committed, in part at least, to the Director of the Geological Survey since June 5, 1908. At various dates, June 5, 1908, April 10, 1909, June 25, 1910, and May 29, 1911, the Secretary of the Interior has approved instructions authorizing and defining cooperation between the Geological Survey and the General Land Office for classifying and valuing coal lands. The procedure has thus the express sanction of the head of the Department and the mere fact that in this and other instances the appraisal was made by the Director and transmitted directly to the Commissioner of the General Land Office, who in turn adopted and promulgated the price fixed, does not invalidate the classification or valuation or violate the coal land laws or the rules and regulations of this Department. It is a fact too well established to need argument, that the Secretary of the Interior, unless personally charged with a duty concerning matters within his jurisdiction, may properly and lawfully delegate the performance of that duty to a subordinate officer, and such has been the practice in this and in other classes of cases involving public lands. In this case it is clear that applicant failed to comply with the express provisions of the coal land regulations; that before he tendered proof or purchase money the price of the land had been materially increased.

Since the receipt of the report in the Department there has been submitted the affidavit of Thomas G. Mays who, it is alleged, acted as the agent for McCornick in filing in the local land office the application to purchase, which affidavit is corroborated by Edward D. Dunn, former chief clerk of the local land office, and by the register of the office, the affidavit being, in substance, to the effect that at time of application Mays offered to pay to the chief clerk the purchase price of the land but that the payment was refused or rejected, the chief clerk informing Mays that it would avail nothing to pay the purchase price until after notice of the application had been duly published, refusing to accept the money until after that time. The register and receiver in a joint statement testified that the action of

the chief clerk was strictly in accordance with the practice of the office at that time.

Attention is also directed to the amendment of section 18 of the coal land regulations recently promulgated by this Department and effective February 1, 1913, which, in substance, provides that at the option of a coal-land applicant the purchase money for coal lands may be paid at the time of filing the application to purchase or at any time thereafter up to 15 days from and after receipt of notice from the register and receiver that the application is allowable, the price to be paid to be that existent at date "of actual payment of the purchase money by the applicants to the register and receiver."

The Department has received complaints from applicants to the effect that registers and receivers accepted the purchase price of coal land and remitted the money to the Treasury prior to the completion of publication and the issuance of final certificate and receipt, and the amendment of paragraph 18 of the coal land regulations was designed to obviate the basis for such complaints. If applicant in this case desired to pay the purchase money at the time of application, he should have formally tendered same and upon its official rejection by the decision of the register and receiver could have preserved his rights, if any, by an appeal. Having failed so to do, he can not plead, as a reason for refusing to pay the price fixed and existent at date of purchase, the conversation with the the former chief clerk "that it would avail nothing to pay the purchase price until after notice of application had been duly published." Assuming, however, that the action of the local land officers in this case was in accordance with the practice then in vogue, it is not perceived how this applicant acquired any right to purchase at the then existent price by the alleged tender of the purchase money at a time when same was not receivable, in view of the fact that he failed to pay the money at the time and within the period fixed by the then-existent coal land regulation 18. In other words, he failed to comply with the rules and regulations governing such purchases and is not in position to complain of the requirement that he pay the purchase price fixed on the land prior to the date of filing final proofs and prior to the date of actual payment, April 4, 1911. The cases cited by counsel in supplemental brief are those where the individual had done everything the law or rules required, which is not the fact here. The amendment to paragraph 18 has no application to this case. It is not retroactive in terms or effect. It establishes a new rule operative on and after February 1, 1913. Cases arising prior to that date are properly subject to adjudication under the rules and regulations then in force. Furthermore, the amended paragraph 18 imposes upon applicant the requirement that he pay the price fixed at time he actually consummates the purchase by paying the money into the

local land office. If he desired to take advantage of his tender, he should have kept it good and paid the money in immediately after the publication. If he was entitled to delay beyond the thirty-day period, he might have delayed indefinitely. At the time McCornick paid the purchase price of \$25 per acre in this case the land had been revalued at from \$117 to \$135 per acre. The Department, therefore, concludes that the Commissioner's finding is in accordance with the law, the regulations, and the facts, and his decision is hereby affirmed.

WILLIAM S. McCORNICK.

Motion for rehearing of departmental decision of March 3, 1913, 41 L. D., 661, denied by Assistant Secretary Laylin, April 30, 1913, and petition for the exercise of the supervisory authority of the Secretary of the Interior denied June 12, 1913.

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 divisions of quarter-quarter sections or rec-
 tangular lotted tracts, where conditions are
 such as to render this course desirable and
 necessary; the minor subdivisional areas so
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 in accordance with, rules and regulations of
 the Land Department, is in effect a valuation
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 required by the regulations, and, prior to the
 tender of proof of purchase money by him,
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35. Circular of June 14, 1912, under act of April 30, 1912, amending act of June 22, 1910, so as to permit selections by States of lands withdrawn, classified, or valuable for coal... 89

36. The provision in the act of June 22, 1910, that lands withdrawn or classified as coal shall be subject to entry under the homestead laws by actual settlers only, the desert-land law, to selection under the Carey Act, and to withdrawal under the reclamation act, with reservation to the United States of the coal therein, does not include State selections, and an indemnity school-land selection for lands withdrawn or classified as coal could not be allowed under that act prior to extension of that provision by the act of April 30, 1912..... 19

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38. The last proviso to section 3 of the act of June 22, 1910, applies only to "lands which have been classified as coal lands," and furnishes no authority to receive an application to locate, enter, or select lands which have been merely withdrawn for classification but not yet classified, and holding the same suspended pending the result of a hearing upon the request of the applicant to determine the character of the land with reference to its coal value..... 145

39. Where a desert entry of more than 160 acres has been allowed for lands withdrawn for examination and classification with respect to coal value, the entryman will be required, under the provisions of sections 1 and 2 of the act of June 22, 1910, to amend his entry so as to reduce the area to 160 acres and to show that the application is made in accordance with and subject to the provisions and reservations of that act..... 319

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Contest—Continued.

character of each 10-acre legal subdivision, based upon personal knowledge; but upon trial of the case it will be incumbent upon the mineral claimant to establish the actual discovery or disclosure of mineral upon each location involved and that the area in conflict is prima facie mineral in character, containing placer deposits; and for the purpose of so showing the land to be mineral in character it may be divided into 10-acre subdivisions, and the contest may be sustained as to such 10-acre tracts as are shown to be of such character..... 642

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1. One who files an application to enter, relying upon a relinquishment filed concurrently therewith but executed 16 months before by a former entryman for the same land, and without having made any inquiry at the local office of the land district in which the land is located to ascertain whether any contest was pending against such entry, does not thereby acquire any such right as will defeat the right of the contestant under an intervening well-founded contest filed in good faith, notwithstanding the relinquishment was in no wise the result of the contest..... 606

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6. The act of May 14, 1880, contemplates that entry by a successful contestant in exercise of the preference right accorded by that act shall be made by contestant in his own name and for his own benefit; and where a contestant procures the Northern Pacific Railway Co., within the preference right period, to make selection of the land under the act of July 1, 1898, for his benefit, in attempted exercise of his preference right, such selection is not a valid exercise of the right accorded by the act of 1880 and will not defeat a prior adverse application to enter the land..... 121

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12. Section 2 of the act of May 14, 1880, contemplates that the notice of preference right to a successful contestant shall issue at a time when the land is subject to entry and be sent to contestant personally; and notice that the land will become subject to entry at some future day, or notice by publication, or notice to his attorney, unless shown to have been actually received by contestant, is not sufficient..... 437

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2. No expenditures can be credited on annual proofs upon a desert land entry unless made on account of that particular entry; and expenditures once credited can not be again applied.....	601
3. The act of March 28, 1908, prohibiting desert-land entries on unsurveyed lands, has no application to the lands in Imperial Valley, Cal., authorized to be resurveyed by the act of July 1, 1902.....	257
4. By taking an assignment of a desert-land entry the assignee is substituted for the original entryman, and his rights under the entry are the same that they would have been had he made the entry in the first instance.....	82
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1. The department can not recognize as binding upon it any stipulation entered into at a hearing by special agents and attorneys for the parties in interest which may preclude the consideration in the case of any question vital to the validity or regularity of the claim involved..... 655

2. It is incumbent upon an applicant for patent or entryman to submit such evidence as may be required by law, regulations, or ruling of the Land Department, to show that the land is of the character subject to his claim, and that he has complied with the law and regulations with respect thereto..... 655

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1. Instructions of May 21, 1912, under act of April 30, 1912, authorizing extension of time to submit desert-land proof..... 28

2. Instructions of October 24, 1912, respecting credit for prior payment upon second proof..... 346

3. Final proof under the enlarged homestead act, covering both surveyed and unsurveyed land, can not lawfully be accepted, nor entry allowed, as to the unsurveyed land, until survey thereof has been made and approved..... 424

Forest Lands.See *Reservation*, 2-9.**Gas Lands.**See *Coal, Oil, and Gas Lands*, 3.**Hearing.**See *Practice*, 8-11.**Homestead.**See *Final Proof*, 3.**GENERALLY.**

1. Where a homestead applicant holds lands under color of title by tax deed and claims them as his own, the Land Department will not undertake to probe minutely the title thereto, to determine whether the State law relating to tax sales was in all respects complied with; and in the absence of an affirmative showing to the contrary by the applicant, he will be held the "proprietor" thereof within the meaning of the provision of section 2289 of the Revised Statutes declaring disqualified to make homestead entry one who is the proprietor of more than 160 acres of land. 387

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2. Where a married woman, a minor, is deserted by her husband, she does not thereby, so long as the disqualification of minority exists, become qualified, as a deserted wife, to make homestead entry, unless she be the head of a family..... 510

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4. The fact that a homestead entryman received for the relinquishment of his entry a small fee paid to a commissioner for executing his homestead entry papers, in addition to the filing fees paid to the local officers, will not disqualify him to make second entry under the act of February 3, 1911..... 523

5. The term "filing fees," as used in the act of February 3, 1911, includes any moneys required by law to be paid at the time of the making of a homestead entry; and an entryman of former Indian lands who relinquished his entry for an amount not exceeding the fees and commissions and the installment of the purchase price paid by him at the time of making the entry, is within the purview of that act..... 420

6. Where a homestead entry has been absolutely abandoned, and is subject to cancellation on contest or governmental proceedings on that ground, the former entryman, by thereafter relinquishing the entry and selling the movable improvements thereon at less than cost and well within their reasonable value, does not disqualify himself to make second homestead entry under the provisions of the act of February 3, 1911..... 336

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7. One who made homestead entry for less than 160 acres can not, by making additional entry and invoking the rule of approximation, be permitted to secure a greater area of land in the aggregate than he might have embraced in his original entry..... 391

8. The right of additional entry accorded by section 6 of the act of March 2, 1889, is for such an amount of land as "added to the quantity previously so entered by him shall not exceed one hundred and sixty acres"; and one who made an original homestead entry for 20 acres is not entitled, by invoking the rule of approximation, to make an additional entry under said section for 160 acres, and so acquire in the aggregate 180 acres.... 386

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9. Circular of July 31, 1912, and amendment of November 20, 1912, relating to location of soldiers' additional rights in Alaska. 116, 356

10. Instructions of March 8, 1913, under the Spaeth decision, respecting the application of the rule of approximation in the location of soldiers' additional rights..... 490

11. The rule of approximation announced in *George E. Lemmon*, 36 L. D., 417, as applicable to locations of soldiers' additional rights, is recalled and vacated, and hereafter no approximation will be allowed in the location, by an assignee, of two or more such rights on one body of land..... 487, 489, 490

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12. The Land Department will not return papers filed in support of a claim of soldiers' additional right under section 2306, Revised Statutes, where the claim is found to be invalid..... 506

13. The making of an adjoining farm entry for an amount of land which added to the original farm aggregates 160 acres exhausts the homestead right; and such an entry can not be made the basis for a soldiers' additional entry of other lands..... 129

14. Upon the death of a soldier entitled to an additional right under section 2306, Revised Statutes, leaving persons qualified to take under section 2307, the right passes immediately to those entitled to the succession, and does not vest in his estate..... 361

15. Where the additional right passes to the widow, there being also minors, it is with the condition subsequent of divestiture in case of her death or remarriage without having used or assigned it; but upon passing to the minors the right becomes perfect and absolute in them, dependent upon no condition, qualification, or liability to divestiture..... 361

16. The right conferred upon the minor children by section 2307, Revised Statutes, is not conditioned upon appropriation thereof by a guardian during their minority, and failure to so appropriate it in nowise affects their title to the additional right under the statute. 361

17. The order of succession to a soldiers' additional right is fixed by section 2307, Revised Statutes, first, to the widow, and second, in event of her death or remarriage before use or assignment of it, to the original entryman's minor children; and State laws and State courts are not competent to control, divest, or defeat the order of succession so fixed by statute..... 361

18. No right of additional entry under sections 2306 and 2307 of the Revised Statutes exists where prior to June 8, 1872, the date the law now embodied in said sections was enacted, the soldier had died, leaving a widow but no children, and the widow had remarried and was at that date a married woman.... 383

19. An order by a probate court of the State of Missouri, directing an administrator to sell a soldiers' additional right, which does not prescribe the terms of sale, as required by section 117 of the Revised Statutes of that State, is, under the construction placed upon said section by the Supreme Court of the State, null and void; and an assignment of the additional right based upon such order will not be recognized by the Land Department..... 451

20. One who prior to the date of the adoption of the Revised Statutes had made homestead entry for less than 160 acres, which was canceled for abandonment, and subsequently, also prior to that date, upon his statement under oath that he had not theretofore perfected or abandoned a homestead entry, was permitted to make another entry,

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for 160 acres, which was later also canceled for abandonment, will not be heard to claim that the later entry so made by him, which on its face was regular and legal, was a nullity, in order to bring himself within the terms of section 2306, Revised Statutes, as one who prior to the adoption of the Revised Statutes had "entered under the homestead laws a quantity of land less than 160 acres"..... 506

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21. Commutation proof upon homestead entries, showing less than 14 months' residence, should not be received, except in cases where statutory authority exists to the contrary..... 505

22. Where, at the time a successful contestant makes entry in exercise of the preference right, the land is subject to entry only under the act of June 22, 1910, he is bound by the provisions of that act; and as said act does not authorize commutation of homestead entries made thereunder, commutation of such entry can not be allowed..... 72

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24. The homestead law contemplates a continuous compliance both as to residence and cultivation, beginning with the date of entry..... 119

25. Upon the death of an entryman those upon whom the statute casts the right to perfect title under the entry are merely required to continue cultivation and improvement of the land, so that failure to cultivate in any given year subjects the entry to contest and possible cancellation..... 119

26. In this case the entryman died 7 months after entry without residence upon or cultivation of the land entered. After more than a year had elapsed following the death of the entryman the widow caused 10 acres to be cleared and harrowed. On contest, it is held that this showing does not meet the requirements of the homestead law and cancellation is ordered..... 119

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27. Circular of October 2, 1912, concerning additional homestead entries under section 2 of the act of April 28, 1904..... 292

28. Additional homesteads under the act of April 28, 1904, are not subject to commutation..... 391

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29. Revised regulations of December 18, 1912, under the Kinkaid Act..... 492

30. The provisions of section 6 of the act of March 2, 1889, authorizing additional homestead entries, apply only to ordinary homestead entries of less than 160 acres, and have no reference whatever to entries made under the provisions of the Kinkaid Act, allowing entries in certain territory not to exceed 640 acres..... 126

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31. Section 7 of the act of May 29, 1908, amending the Kinkaid Act and authorizing one who has an entry thereunder of less than 640 acres to enter sufficient contiguous land to aggregate 640 acres, has no application to one whose entry under the Kinkaid Act was limited to less than 640 acres because of the fact that he had theretofore made entry under the general provisions of the homestead law said section contemplating that the aggregate of all entries by one person—under the general homestead law, the Kinkaid Act, and the amendatory act—shall not exceed 640 acres. 285

ENLARGED.

32. Instructions of August 14, 1912, concerning additional entries under enlarged homestead acts. 149

33. The holding of 160 acres by desert-land entry does not disqualify an applicant under the enlarged homestead act from making entry under that act for the full amount of 320 acres. 316

34. After the submission of commutation proof upon a homestead entry such entry can not be made the basis for an additional entry under the enlarged homestead act of February 19, 1909, although payment of the commutation money had not been made at the time the additional application was filed. 367

35. A homestead entry upon which final proof was not submitted within the period fixed therefor by statute can not, after the expiration of such period, be made the basis for an additional entry under section 3 of the act of February 19, 1909. 134

36. An additional entry under section 3 of the enlarged homestead act of February 19, 1909, can not be allowed where the additional lands applied for, together with the lands embraced in the original entry, exceed 1½ miles in length. 282

37. One who made homestead entry for less than 160 acres and subsequently made additional entry under section 6 of the act of March 2, 1889, for an amount of land which together with the original entry aggregates 160 acres, is not entitled to make further entry under section 3 of the enlarged homestead act as additional to the entry made under said section 6 of the act of 1889. 381

38. One who by making adjoining farm entry exhausted his homestead right is entitled under the provisions of section 6 of the act of March 2, 1889, if otherwise qualified, to make another entry for such an amount of land as added to the amount embraced in the adjoining farm entry will not exceed 160 acres; but is not entitled to make further entry, by virtue of the provisions of section 3 of the enlarged homestead act of February 19, 1909, as additional to the entry made under the act of 1889. 138

39. An entryman in making proof of residence under the enlarged homestead act of February 19, 1909, is entitled, under section 2305 of the Revised Statutes, to credit for

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military service; but the provisions of said section can not be extended to relieve him from the specific requirements of the enlarged homestead act respecting cultivation. 366

40. The provision in the act of August 30, 1890, limiting the amount of land that may be acquired by one person under the agricultural public-land laws to 320 acres, does not prevent one who has acquired title to 160 acres under the desert-land law, and who is entitled to make homestead entry for 160 acres under the general provisions of the homestead law, from making entry and acquiring title to 320 acres under the enlarged homestead act of February 19, 1909. 418

41. The act of August 24, 1912, validating certain entries theretofore allowed under the enlarged homestead act, applies only in instances where at the time of making the enlarged entry the entryman had "acquired title to a technical quarter-section of land under the homestead law" containing less than 160 acres; and has no application where the entryman at the time of making the enlarged entry had acquired title to 80 acres under an original homestead entry and had a subsisting additional entry under section 6 of the act of March 2, 1889, for a tract of land in a different quarter-section which together with the original entry aggregated 160 acres. 381

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42. Circulars of July 15, 1912, and February 13, 1913, under the act of June 6, 1912. 103, 479

43. Circulars of June 10, and 29, 1912, concerning election under the three-year act. 84, 99

44. Instructions of October 1, 1912, under act of August 24, 1912, respecting election under the three-year act. 325

45. The three-year homestead act of June 6, 1912, is applicable to homestead entries in the District of Alaska. 353

46. The failure of a homestead entryman who made entry prior to the act of June 6, 1912, to elect to make proof under the law under which his entry was made, where notice was mailed to him in accordance with the act, subjects his entry to adjudication under said act, regardless of the reason that influenced him or caused his failure to elect to have his entry adjudicated under the old law. 111

47. Respecting the cultivation necessary to be shown upon homestead entries made prior to the act of June 6, 1912, where, through failure to elect, the entries must be adjudicated under said act, in all cases where upon considering the whole record the good faith of the entryman appears, the proof will be acceptable if it shows cultivation of at least one-sixteenth of the area of the entry for one year and at least one-eighth for the next year and each succeeding year until final proof, without regard to the particular year of the homestead period in which the cultivation of the one-sixteenth was performed. 111

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48. The provision in paragraph 18 of the instructions of July 15, 1912, under the three-year homestead act of June 6, 1912, that where good faith appears proof may be accepted if it shows cultivation of at least one-sixteenth in one year and at least one-eighth in the next and each succeeding year until final proof without regard to the particular year of the homestead period in which the cultivation of the one-sixteenth was performed, is applicable to entries made under sections 1 to 5 of the enlarged-homestead act of February 19, 1909, as well as to homestead entries under sections 2289 to 2291 of the Revised Statutes..... 531

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8. The provisions of section 4 of the act of February 8, 1887, authorizing allotments to the minor children of an Indian settler on the public domain, include stepchildren and all other children to whom the settler stands in loco parentis..... 626

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land; but as an entryman under said acts is required, in addition to compliance with the general homestead laws, to reclaim at least one-half of the total irrigable area of his entry for agricultural purposes and to pay the water-right charges apportioned against the tract, final certificate should not issue until the land has been reclaimed and the charges apportioned and paid in accordance with the provisions of said acts..... 521

10. The act of March 4, 1911, providing for the issuance of patent upon homestead entries within the former Siletz Indian Reservation where the entryman had built a house on the land and actually entered into occupation thereof and cultivated a portion of the land for the period required by law, is a remedial act intended to relieve bona fide claimants from the rigid requirement of actual residence for the period of three years contained in the act of August 15, 1894, but does not wholly dispense with residence; and one claiming the benefit of the act of 1911 must show efforts to comply with the provisions of the act of 1894, respecting residence and cultivation, evidencing bona fide intent to make it his home and develop it as a farm... 309

11. The price of Rosebud Indian lands opened to disposition under the act of March 2, 1907, was, under the regulations of January 12, 1909, \$6 per acre for all lands entered during the first period fixed by said regulations, \$4.50 for lands entered during the second period, and \$2.50 thereafter. Where by mistake in description a tract not intended to be taken was included in a homestead entry made during the first period and the entry was, before the expiration of that period, amended by elimination of such tract, such erroneous entry will not be considered as fixing the price of the eliminated tract so far as a subsequent entryman is concerned; and the tract having remained open to entry by anyone desiring to take it during the remainder of the first period and during all of the second period, without anyone making entry thereof, the price to be charged an entryman thereafter should be at the then existing rate of \$2.50..... 637

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4. Under the general provisions of law charging the Commissioner of the General Land Office, under the supervision and direction of the Secretary of the Interior, with the public business relating to the public lands, he has full power, in case the register and receiver are deemed by him disqualified to preside at a hearing in a proceeding affecting public lands, to designate two proper officers to preside at such hearing in their stead.....	295
5. The disqualification imposed by the act of January 11, 1894, upon registers and receivers to sit in a hearing in any cause pending in any local office where such officer is related to any of the parties in interest can not be waived by consent of the parties; and any proceeding had in contravention of the statute is without jurisdiction and void.....	392

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Mineral Land.

See *Railroad Grant*, 1-6; *Withdrawal*, 1.

1. The Land Department retains jurisdiction to consider and determine the character

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of land claimed under the mining laws until deprived thereof by issuance of patent; and an adjudication that land is mineral does not preclude subsequent investigation by the Land Department as to its character. 520

2. Relinquishment of a homestead entry as to a part of a 40-acre legal subdivision, on the ground that it is mineral in character, will not be accepted unless the mineral character of the tract sought to be relinquished is shown to have been established in accordance with the requirements of paragraph (c) of section 37 of the general mining regulations of March 29, 1909. 132

3. Land of little value for agricultural purposes, but which contains extensive deposits of finely divided pumice or volcanic ash, suitable for use in the manufacture of roofing materials and abrasive soaps, and having a positive commercial value for such purposes, is mineral land and not subject to disposition under the agricultural laws. 584

4. The mere fact that land contains deposits of ordinary clay, or of limestone, is not in itself sufficient to bring it within the class of mineral lands and thereby exclude it from homestead or other agricultural entry, even though some slight use may be made commercially of such deposits. There may, however, be deposits of clay or limestone of such exceptional nature as to warrant the classification of the lands containing them as mineral lands. 314

5. The fact that an entryman under a non-mineral public-land law is so inexperienced as to be unable to recognize existing mineral deposits upon the land, does not warrant the United States in permitting him to take mineral land under a nonmineral entry; and it is not necessary in order to declare a tract mineral in character that personal knowledge of the existence of the mineral deposits be brought home to the entryman, if the presence of minerals be demonstrated. 639

Mining Claim.**GENERALLY.**

1. General regulations of March 29, 1909, reapproved November 6, 1912, and reprinted in pamphlet form, with amendments. 396

2. Paragraphs 33 and 88 of general regulations amended. 77, 354

3. It is the purpose of the mining laws to reserve from disposition and ~~to~~ devote to mineral sale and exploitation only such lands as possess mineral deposits of special or peculiar value in trade, commerce, manufacture, science, or the arts. 655

4. It is not necessary to entitle a mining claimant to patent under section 2332 Revised Statutes, that such claimant shall personally have been in adverse possession of the claim for the period fixed by that section; it is sufficient thereunder that the claimant and his grantors shall have held and worked the claim for such period. 653

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LOCATION.

5. Instructions of June 15, 1911, under act of March 2, 1911, concerning oil locations made prior to the date of said act. 91

APPLICATION.

6. In passing upon a mineral application for patent, the good faith of the applicant and the use to which he has devoted or may intend to devote the land is a proper element for consideration by the land department as incidental to, and throwing light upon, the real value and character of the land. 655

7. The verification of an application for patent to a mining claim by an attorney-in-fact for the claimant, at a time when the claimant himself is both resident and physically within the land district, is unauthorized, and entry allowed upon such application is invalid and can not be submitted to the Board of Equitable Adjudication. 614

SURVEY.

8. Instructions of October 8, 1912, governing plats of survey of mining claims in Alaska. 294

NOTICE.

9. The regulations respecting the publication of notice of an application for patent for a mining claim require that the notice shall appear in each issue of the designated newspaper published during the 60-day period fixed by section 2325, Revised Statutes, excluding the first day of issue; and publication in only one issue each week of a triweekly newspaper, for the period of 60 days, does not meet the requirements of the statute and regulations. 369

DISCOVERY.

10. An adjudication by the Land Department that land is mineral does not dispense with the necessity for making a discovery of mineral thereon as a basis for a mining location and patent. 520

11. The requirement of section 2320, Revised Statutes, that there must be a discovery of a vein or lode of quartz or other rock in place, bearing gold or other valuable deposits, to support a lode mining location, is mandatory and can not be waived by the department. 320

12. To constitute a valid discovery upon a lode mining claim three elements are necessary: (1) There must be a vein or lode of quartz or other rock in place; (2) the quartz or other rock in place must carry gold or some other valuable mineral deposit; and (3) the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine. 320

13. The exposure of substantially valueless deposits on the surface of a lode mining claim, in themselves insusceptible of practical development, but which taken in connection with other established geological and mineralogical conditions in the district lead to the hope or

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DISCOVERY—Continued.

belief that a valuable mineral deposit exists within the claim, does not constitute the discovery of a vein or lode within the meaning of the law nor afford a valid basis for a lode location..... 242

14. The location of a lode mining claim must be supported by the discovery of the vein or lode within the limits of the claim located; and the exposure of substantially worthless deposits on the surface of a claim, which from observation and geological inference are supposed to indicate that other and unconnected veins or lodes lie at a greater depth, does not constitute a discovery within contemplation of the law, and is not a sufficient basis for a valid location..... 255

15. Country rock in which it is claimed "kidneys" of copper ore may be expected to be found, is not itself a lode within the meaning of the mining laws, and the exposure of such rock within the limits of a lode claim, which may or may not contain mineral, does not constitute the discovery of a vein or lode within the meaning of the law and is not a sufficient basis to support a lode location..... 255

LODE.

16. A mineral deposit in vein or lode formation—in place in the general mass of the mountain—whether the mineral it bears be metallic or nonmetallic, is subject to disposition only under the provisions of the lode mining laws..... 403

17. A deposit of phosphate rock confined between well-defined boundaries constitutes a vein or lode of mineral-bearing rock in place and is subject to disposition only under the provisions of the lode mining laws..... 403

PLACER.

18. A corporation, regardless of the number of its stockholders, may lawfully locate no greater placer area under the mining laws than is allowable in the case of an individual, namely, 20 acres..... 655

19. The act of August 4, 1892, authorizing the location of land chiefly valuable for building stone under the placer mining laws, applies only to deposits of stone of special or peculiar value for structural work, such as the erection of buildings, and such other recognized commercial uses as demand and will secure the profitable extraction and marketing of the product; and has no application to the vast deposits of low-grade rock in the public domain which possess no special or peculiar value for structural purposes, and are useful only for rough work in the immediate vicinity..... 655

20. Where an affidavit of contest by a placer mining claimant against a homestead entry charges that the land in controversy is mineral in character, and contains averments sufficient to apprise the homestead claimant of the nature of the case and to enable him to prepare his defense without danger of surprise,

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PLACER—Continued.

it is not necessary that the affidavit further contain positive averments as to the character of each 10-acre legal subdivision, based upon personal knowledge; but upon trial of the case it will be incumbent upon the mineral claimant to establish the actual discovery or disclosure of mineral upon each location involved and that the area in conflict is *prima facie* mineral in character, containing placer deposits; and for the purpose of so showing the land to be mineral in character it may be divided into 10-acre subdivisions, and the contest may be sustained as to such 10-acre tracts as are shown to be of such character... 642

National Forests.

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Notice.

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Oklahoma Lands.

1. Instructions of June 8, 1912, under act of April 27, 1912, extending time for payment on pasture lands..... 80

2. The extension charge of 5 per cent authorized by the acts of March 11, 1908, and February 18, 1909, for extension for one year of payments on purchases of Oklahoma pasture lands under the act of June 28, 1906, is in lieu of interest for the year covered by the extension; and there is no authority for also charging interest during that period or for considering such extension charge as interest..... 267

3. Extension charges under the acts of March 11, 1908, and February 18, 1909, should be computed on the aggregate amount of the deferred payment and the interest thereon, and not on the deferred payment alone..... 268

4. Any deficiency in payments on account of interest on deferred payments, due at the date of the act of April 27, 1912, is subject to division and extension under the provisions of that act..... 268

5. Any deficiency in extension payments made under the acts of March 11, 1908, and February 18, 1909, is a debt due and is not subject to extension, nor is interest chargeable thereon; and payment thereof must be made within 30 days from notice, on penalty of cancellation of the entry..... 268

6. Payment of the 5 per cent extension charge under the acts of March 11, 1908, and February 18, 1909, on an installment of the purchase price of Oklahoma pasture lands, operates to extend only the particular installment upon which such charge is paid, and does not operate to extend any other payments not yet due and upon which no extension charge has been computed or paid..... 608

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7. Installments not paid and not extended under said acts continue after maturity, and extended installments continue after the year of extension, and prior to March 26, 1910, to draw interest at the rate of 6 per cent per annum fixed in the original purchase act of June 28, 1906, up to the date of the act of March 26, 1910, and thereafter at the rate of 5 per cent per annum fixed by the latter act. 608

8. Installments falling due originally, or as extended under the acts of March 11, 1908, and February 18, 1909, after March 26, 1910, draw interest at the rate of 5 per cent per annum from the date they fall due until they again become due as extended by the act of March 26, 1910. 608

9. Installments falling due as extended by the act of March 26, 1910, together with the interest thereon, are, under the act of April 27, 1912, to be subdivided into two parts each, at the dates they severally become due, one of such parts falling due one year from the date of the first subdivision and the remainder successively one each year thereafter until all are paid, with interest thereon at the rate of 4 per cent per annum. 608

10. Lands in the former Fort Sill wood reserve, which were by Executive proclamation of September 19, 1906, "opened to settlement and disposition under the provisions of the act of June 5, 1906," are not subject to entry under the general provisions of the homestead law. 263

11. Sections 13, 16, 33, and 36 in the so-called pasture and wood reserves are subject to disposition for the benefit of the Indians under the provisions of the act of Congress of March 3, 1911, and did not pass to the State of Oklahoma under its school grant, which must be satisfied, so far as these lands are concerned, under the indemnity provisions of the act of June 6, 1900. 433

12. Lands ceded to the United States by the Comanche, Kiowa, and Apache Tribes of Indians, and by the act of June 6, 1900, made subject to disposal under the general provisions of the homestead, town-site, and mining laws, are not subject to disposal under the timber and stone act. 132

Parks.

1. Regulations under act of August 22, 1912, making a grant for park purposes to Canon City and Boulder, Colo. 290

Patent.

1. Where a patent, erroneously issued to a railway company for a tract of land excepted from its grant by a valid settlement existing at the date of definite location, is by a court of competent jurisdiction declared a nullity, and such judgment becomes final, the railway company and all persons claiming under it are thereby concluded and estopped to assert title under the patent, and the Land Department may accept the judgment of the court and dispose of the land as public land of the United States. 140

Payment.

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1. Instructions of October 24, 1912, respecting credit for prior payment upon second proof. 346

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Practice.

GENERALLY.

1. Instructions of December 18, 1912, respecting contests against final entry. 412

2. A decision by the register and receiver, or other proper officers acting in their stead, is more in the nature of a recommendation to the Commissioner of the General Land Office than a judgment, and the commissioner has jurisdiction to render his judgment, subject to review by the Secretary of the Interior, irrespective of or in the absence of such recommendation. 295

3. Where at the time of the initiation of a contest against a homestead entry contestant met the requirements of Rules 1 and 2 of Practice, by stating that he intended to make homestead entry of the land and by showing himself qualified to make such entry, the contest will not abate merely because contestant thereafter becomes disqualified to make homestead entry of that land by exercising his right on other land. 518

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5. Rule 14, relating to contests, amended. 274

6. Rule 83, relating to motions for rehearing, amended. 175

7. Special rules governing protests against applications for permits for development, transmission, and use of power. 590

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8. The department can not recognize as binding upon it any stipulation entered into at a hearing by special agents and attorneys for the parties in interest which may preclude the consideration in the case of any question vital to the validity or regularity of the claim involved. 655

9. The disqualification imposed by the act of January 11, 1894, upon registers and receivers to sit in a hearing in any cause pending in any local office where such officer is related to any of the parties in interest can not be waived by consent of the parties; and any proceeding had in contravention of the statute is without jurisdiction and void. 392

10. Under the general provisions of law charging the Commissioner of the General Land Office, under the supervision and direction of the Secretary of the Interior, with the public business relating to the public lands, he has full power, in case the register and

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receiver are deemed by him disqualified to preside at a hearing in a proceeding affecting public lands, to designate two proper officers to preside at such hearing in their stead..... 295

11. Consolidation of the trial or hearing as to a number of entries is within the sound discretion of the Commissioner of the General Land Office or the register and receiver, and may properly be ordered, for convenience in the introduction and consideration of the testimony, where there are many material facts in common to all the entries; and one decision covering all the entries may be rendered, instead of a separate decision as to each entry..... 616

NOTICE.

12. The old Rules of Practice were superseded by the revised rules which went into effect February 1, 1911, and no jurisdiction is acquired by publication under the old rules of notice of a contest filed after such rules ceased to be operative..... 367

13. Section 2 of the act of May 14, 1880, contemplates that the notice of preference right to a successful contestant shall issue at a time when the land is subject to entry and be sent to contestant personally; and notice that the land will become subject to entry at some future day, or notice by publication, or notice to his attorney, unless shown to have been actually received by contestant, is not sufficient. 437

14. Where notice of a contest is sent by registered mail, proof of delivery of the registered letter containing the notice to the agent of the addressee, authorized by him, in writing, to receive it, is a compliance with the requirement of Rule 7 of the Rules of Practice that service of notice in such case must be evidenced by the post-office registry return receipt, "showing personal delivery to the party to whom the same is directed"..... 124

15. Where notice of contest was served within the time fixed by Rule 8 of Practice, the contest does not abate, under that rule, merely because contestant failed to serve with the notice a copy of the affidavit of contest, as required by Rule 7—Rule 12 specifically declaring that no contest proceeding shall abate because of any defect in the manner of service of notice in any case where copy of the notice or affidavit of contest is shown to have been received by the person to be served..... 512

16. Rule 79 of Practice, suspending action for 20 days from service of notice of a decision of the Commissioner of the General Land Office denying the right of appeal, with a view to affording the party against whom the decision was rendered an opportunity to apply for certiorari, operates merely as a supersedeas for the period of 20 days, and is not a limitation upon the power of the Secretary of the Interior to grant an application for certiorari filed after the expiration of that period..... 136

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17. Where a charge of failure to comply with the law is made by an officer of the Government against a homestead entry upon which final proof has been submitted but suspended for investigation, the burden is upon the entryman to show affirmatively that the requirements of the law have been met..... 513

18. Proceedings by the Government against a coal land entry are not invalidated by reason of failure to serve notice thereof upon the first transferee, where he no longer has any interest in the claim and is under no liability to protect those to whom he has transferred.... 616

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2. Deposits of petroleum are mineral within the meaning of the act of July 27, 1866..... 264

3. The mineral character of a tract of land within the primary limits of the grant to the Southern Pacific Railroad Co. is prima facie established by its classification as oil-bearing land; but the company is entitled, upon proper notice and showing, to a hearing to show error in the classification..... 264

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6. The indemnity selection for lost mineral lands may be made within 50 miles of the line of the road..... 571
7. Selections under the exchange provisions of the act of July 1, 1898, based upon uncompleted claims relinquished under that act because in conflict with the grant to the Northern Pacific Railway Co. must in every instance be confined to one transaction and to lands in a compact body in one land district; but selections based upon completed claims relinquished under that act need not be confined to a single transaction and may embrace noncontiguous tracts in different land districts..... 271

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2. Order of October 3, 1912, concerning settlement and improvements upon lands withdrawn under the reclamation act..... 293
3. Where a homestead entry covering lands within a reclamation withdrawal is conformed to a farm unit, the lands thereby uncovered are not relinquished within the meaning of the act of February 18, 1911, and are not subject to entry thereunder..... 69
4. The act of February 18, 1911, providing that upon relinquishment of an entry, made prior to June 25, 1910, for lands within a reclamation withdrawal, the lands so relinquished shall be subject to settlement and entry under the reclamation act, has reference only to lands covered by second-form withdrawals, and has no application to lands withdrawn under the first form..... 68
5. The act of February 18, 1911, providing that where entries covering lands withdrawn under the reclamation act, made prior to June 25, 1910, have been or may be relinquished in whole or in part, the lands so relinquished shall be subject to settlement and entry under the homestead law, as amended by the reclamation act, has no application where cancellation of the entry was the result of a contest, and not of a relinquishment..... 67
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7. A successful contestant in exercising his preference right of entry upon lands within a reclamation project is limited to one farm unit, although such unit may embrace less than the area covered by the entry he contested..... 286
8. Where prior to the regulations of October 15, 1910, a contest was properly initiated, under then-existing laws and regulations, against an entry within a second-form withdrawal under the reclamation act, and the entry was canceled as a result of such contest after the act of June 25, 1910, either prior or subsequent to October 15, 1910, the contestant thereby acquired a preference right of entry to the lands involved, notwithstanding the limitations contained in said act of June 25, 1910, as to entries thereafter allowed for lands within second-form withdrawals, and notwithstanding the said regulations of October 15, 1910, which preference right he is entitled to exercise upon the lands again becoming subject to entry; but contests heretofore dismissed under said regulations will not be reopened where third parties have acquired rights under such adjudications..... 326
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12. The reclamation act contemplates that one family shall acquire only one farm unit thereunder; and where an entry within a reclamation project is conformed to farm units, the wife of the entryman is not qualified to take an assignment under the act of June 23, 1910, of a portion of her husband's entry excluded from the farm unit retained by him..... 422
13. The act of June 23, 1910, authorizing the assignment of parts of homestead entries within reclamation projects, has no application to entries which prior to that act had been adjusted to farm units and canceled as to the residue, after due notice; and an attempted assignment under that act of land so eliminated as residue is without authority of law and can not be recognized..... 394
14. Where, in conforming a homestead entry within a reclamation project to farm units, a legal subdivision thereof, not retained by the entryman, is, with other vacant land, embraced in a farm unit, the entryman can

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ENTRY—Continued.

not thereafter, under the provisions of the act of June 23, 1910, assign such tract as a legal subdivision, for the reason that the legal subdivision, as such, no longer exists, having been merged in the farm unit; nor can he make assignment under that act of the farm unit into which such legal subdivision has been merged, for the reason that the farm unit includes land not embraced in his original entry. 422

15. Section 5 of the act of June 27, 1906, authorizing an extension of time for compliance with law on desert entries within reclamation projects, applies only to entrymen who have been directly or indirectly delayed or prevented from carrying out their plans and works for obtaining a water supply by creation of a reclamation project. 377

16. Where after entry of a farm unit within a reclamation project the farm-unit plat is amended and the entryman in conforming his entry to the amended plat retains only part of the land originally entered, he is entitled to have the payments theretofore made on account of building charges and on account of the Indian price for the land credited to the retained portion, but is not entitled to have the payments on account of operation and maintenance so credited. 389

17. The provision in section 5 of the reclamation act that failure to make payment of any two annual installments when due shall render the entry subject to cancellation, with forfeiture of all rights under the act, is not mandatory, but it rests in the sound discretion of the Secretary of the Interior whether the entryman in such case may thereafter be permitted to cure his default by payment of the water charges, where he has continued to comply with the provisions of the homestead law; and in event an entry has been canceled for such failure, the Secretary may, in the absence of adverse claim, authorize reinstatement thereof with a view to permitting the entryman to cure his default. 86

PROJECTS.

18. Public notice of May 2, 1912, relating to Bellefourche project. 2

19. Order of May 2, 1912, governing extension of time for payment on lands in Bellefourche project. 6

20. Order of June 25, 1912, extending time for payment in Buford-Trenton project. 92

21. Order of May 13, 1912, relating to South Side Pumping Unit, Minidoka project. 15

22. Public notice of June 24, 1912, relating to water service in North Platte project. 92

23. Order of May 23, 1912, respecting deferred payments in North Platte project. 31

24. Public notice of March 11, 1913, concerning payment of installments on North Platte project. 631

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PROJECTS—Continued.

25. Order of July 6, 1912, concerning water rights in Okanogan project. 99

26. Order of July 17, 1912, relating to water service in Shoshone project. 114

27. Order of January 17, 1913, concerning payment of installments on Shoshone project. 474

28. Order of July 13, 1912, extending time for payment in Fort Shaw Unit, Sun River project. 102

29. Public notice of June 13, 1912, concerning water service in Truckee-Carson project. 88

30. Order of November 14, 1912, relating to payment in Truckee-Carson project. 433

31. Public notice of January 17, 1913, respecting building charge in Truckee-Carson project. 473

32. Order of June 25, 1912, extending time for payment in Williston project. 94

33. Public notice of March 11, 1913, respecting water service in Williston project. 632

34. Public notice of May 10, 1912, relating to Tieton Unit, Yakima project. 14

35. Public notice of May 31, 1912, respecting Sunnyside Unit, Yakima project. 73

36. Order of March 6, 1913, extending time for payment of instalment on Yuma project. 613

Records.

1. Regulations of October 17, 1912, under act of August 24, 1912, concerning certified copies of records. 333

2. Instructions of January 23, 1913, governing the furnishing of certified copies of records under the act of August 24, 1912. 475

3. Instructions of November 29, 1912, relating to inspection of serial number registers in local offices. 358

Rehearing.

See *Practice*, 19-20.

Relinquishment.

1. Relinquishment of a homestead entry as to a part of a 40-acre legal subdivision, on the ground that it is mineral in character, will not be accepted unless the mineral character of the tract sought to be relinquished is shown to have been established in accordance with the requirements of paragraph (c) of section 37 of the general mining regulations of March 29, 1909. 132

2. One who files an application to enter, relying upon a relinquishment filed concurrently therewith but executed 16 months before by a former entryman for the same land, and without having made any inquiry at the local office of the land district in which the land is located to ascertain whether any contest was pending against such entry, does not thereby acquire any such right as will defeat the right of the contestant under an intervening well-founded contest filed in good faith, notwithstanding the relinquishment was in no wise the result of the contest. 695

Repayment.**GENERALLY.**

1. Where a properly-allowed homestead entry is canceled upon voluntary relinquishment, neither the act of June 16, 1880, nor the act of March 26, 1908, authorizes repayment of the moneys paid in connection therewith.... 63

2. A homestead entryman who was required to pay for the area embraced in his entry in excess of 160 acres, and was thereafter permitted to change his entry, under section 2372, Revised Statutes, to embrace other land aggregating only 160 acres, is not entitled to repayment of the amount paid by him for the excess acreage embraced in his original entry. 515

3. Where an applicant for patent for a mining claim, after due notice that charges have been filed by an officer of the Government affecting the validity of the claim, fails to make any denial of the charges or to apply for a hearing, and the application is thereupon rejected, he is not entitled, in the absence of a showing that the default and judgment were taken as the result of mistake, surprise, or excusable neglect on his part, to repayment of the purchase moneys paid in connection with the application for patent. 288

"ERRONEOUSLY ALLOWED."

4. Where a homestead entry was allowed subject to the provisions of the act of June 22, 1910, contrary to the purpose of the applicant, who filed an ordinary homestead application with the intention to secure the land free from restriction, and the entryman, rather than take the land subject to the conditions imposed by that act, relinquished the entry, he is entitled to repayment of the fees and commissions paid by him in connection with the entry. 414

"CANCELED FOR CONFLICT."

5. An entry voluntarily and in good faith relinquished because in conflict with a prior settlement claim of another protected by the act of May 14, 1880, is "canceled for conflict" within the meaning of the act of June 16, 1880, and the entryman is entitled to repayment of the moneys paid in connection therewith.... 328

ACT OF MARCH 26, 1908.

6. While the repayment act of March 26, 1908, is supplemental to the act of June 16, 1880, it nevertheless affords relief in certain cases coming within its provisions where repayment could not be allowed under the earlier act. 350

7. The purchase money paid in connection with a mineral entry, made in good faith but canceled for lack of sufficient proof of discovery, may be repaid under the provisions of the act of March 26, 1908. 350

8. The act of March 26, 1908, specifically limits repayments thereunder to "purchase moneys and commissions," and furnishes no authority for repayment of "fees" paid in connection with applications for segregation under the Carey Act. 372

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Repayment—Continued.

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ACT OF MARCH 26, 1908—Continued.

9. Where a desert-land entry was made for land other than that intended to be taken, due to mistake on the part of the applicant or his agent in giving erroneous description of the land desired, and the entry was thereafter for that reason voluntarily relinquished, neither the act of June 16, 1880, nor the act of March 26, 1908, authorizes repayment of the moneys paid in connection with the entry; but in the absence of fraud the entry canceled upon the relinquishment may be reinstated, if the entryman so desires, with a view to permitting him to amend his entry, under the provisions of the act of February 24, 1909, to cover other unappropriated public land. 65

Res Judicata.

1. While the rules of res judicata and stare decisis should be considered and respected by the Secretary of the Interior, he is not precluded thereby from taking proper action in any matter remaining subject to his jurisdiction. 384

Reservation.**INDIAN.**

1. The filing of a selection under the act of April 21, 1904, authorizing the selection of public lands in exchange for lands in Indian reservations, constitutes an appropriation of the lands within the meaning of the act of June 20, 1910, making an additional grant of school lands to Arizona, and said latter act therefore furnishes no obstacle to the consummation of such selection pending at the date of its passage. 96

FOREST LANDS.

2. Section 1 of the act of March 3, 1911, authorizing the reinstatement of homestead entries canceled or relinquished because of the erroneous allowance of such entries after the withdrawal of lands for national forest purposes, makes no provision for the reinstatement of canceled timber and stone entries... 26

3. Section 2 of the act of March 3, 1911, providing that where contests were initiated prior to the withdrawal of lands for national forest purposes the qualified successful contestant may exercise his preference right to enter within six months after the passage of said act, contemplates that a contestant seeking to exercise his preference right under that act shall be qualified as an entryman at the date he makes application to enter, and if then not qualified his application must be rejected, notwithstanding he may have been qualified at the time the preference right of entry was earned. 261

4. There is no statutory right of contest against a forest lieu selection, and no preference right of entry inures to a contestant who procures the cancellation of a selection. 278

5. The right of lieu selection accorded by the act of June 4, 1897, is not transferable; and the presentation of such a selection by a successful

Reservation—Continued.

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FOREST LANDS—Continued.

contestant, not in his own right but as attorney in fact for another entitled to make a lieu selection under that act, is not a proper exercise of the preference right of entry, and no right inures to contestant by virtue of such attempted selection. 284

6. A forest lieu selection invalid because allowed for lands adversely occupied at the date of the selection is not validated by the subsequent abandonment of the lands by the occupant. 278

7. Abandoned cabins, houses, clearing, or other improvements of settlers who once occupied public land and afterwards left it, can not be considered such possession or occupancy as will exclude the land from forest lieu selection under the act of June 4, 1897. 647

8. Paragraph 18 of the regulations of July 7, 1902, requiring that "all papers and proofs necessary to complete a selection must be filed at one and the same time, and until they are presented no right will vest under the selection," has the effect to postpone the vesting of title as between the United States and the selector only; but as between the selector and third parties rights are determined primarily by the conditions existing at the date of making selection, and the first in right at that time continues so until default. 278

9. The Commissioner of the General Land Office is without authority to receive and pass upon proof to support a forest lieu selection of unsurveyed lands until the plat of survey of the township has been accepted by him, and his approval of a selection of unsurveyed lands confers upon the selector no equitable title; but where the selection is still of record at the date of the filing of the township plat, and the selector thereupon adjusts his selection thereto and submits the same for final approval, such submission is in effect a reselection, and the Land Department may permit the selection to be perfected as of that date, notwithstanding an intervening protest against the same charging that the lands were occupied at the date of the original attempted selection. 278

Residence.

1. The homestead law contemplates a continuous compliance both as to residence and cultivation, beginning with the date of entry. 119

2. An entryman for a surveyed tract can not, by residing upon an adjoining unsurveyed tract, receive credit for such residence upon the tract embraced in his entry. 424

3. While homestead entrymen have sometimes been allowed credit for constructive residence during absences due to official employment, such absences have never been recognized as residence on mere settlement claims prior to entry. 430

4. Section 2 of the act of January 28, 1910, granting leave of absence to homestead entrymen in certain States for a period of three

Residence—Continued.

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months from the passage of the act, has no application to an entryman who failed to establish residence within the time fixed by law and was in default long prior to the date of said act, and such section will not protect the entryman in such case from a charge of abandonment during such period. 118

5. The act of January 28, 1910, granting a leave of absence to homestead settlers in certain States for a period of three months from the date of the act, does not have the effect to protect such entries from a charge of abandonment for six months after the termination of the period of absence granted; but where absence next prior to such period of leave, and absence next following the same, together amount to more than six months, contest on the charge of abandonment will properly lie. 289

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Right of Way.

TELEGRAPH, TELEPHONE, ETC.

1. Regulations of January 6, 1913, governing rights of way for telegraph and telephone lines. 454

STATION GROUNDS.

2. Section 1 of the act of March 3, 1875, does not make an absolute grant of 20 acres of public lands for station purposes for each 10 miles of road, regardless of necessity therefor; but the measure of the right thereby granted is the reasonable necessities of the road, not to exceed either 20 acres to each station or one station for each 10 miles. 599

3. In making a showing to support an application for station grounds under the act of March 3, 1875, the railroad company is not limited to immediate necessities but may include the reasonable demands of the future based upon existing probabilities. 599

4. The use of station grounds acquired under the act of March 3, 1875, is not restricted to the uses specifically mentioned in the act, but may, upon a clear and definite showing of necessity therefor, include any use legitimate to the general business of railroading as carried on by railroad companies generally in serving the public. 599

5. The act of March 3, 1875, does not contemplate or authorize the inclusion within an application for station purposes of lands desired merely for the purpose of taking therefrom earth and other material to be used in the construction or maintenance of the road. 599

CANALS, DITCHES, AND RESERVOIRS.

6. Regulations of May 7 and July 10, 1912, amending paragraphs 8, 38, and 43 of regulations of June 6, 1908. 13, 101

7. Application of the city of San Francisco for Lake Eleanor and Hetch Hetchy Valley reservoir sites, in Yosemite National Park, considered and discussed. 561

Right of Way—Continued.

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CANALS, DITCHES, AND RESERVOIRS—CON.

8. A prior subsisting approval of a right of way under the act of March 3, 1891, will not prevent favorable action upon a second application for right of way under said act, in conflict with the approved right, where the public interest would be best subserved and protected by such course. 516

9. An application for an easement under sections 18 to 21 of the act of March 3, 1891, for a site of an irrigation reservoir, the utilization of which might jeopardize the success of a Government reclamation project, should not be granted, but authority to construct such reservoir, under the supervision and control of the Secretary of the Interior, may be granted under the provisions of section 2 of the act of February 21, 1911. 425

10. The mere fact that lands reserved as reservoir sites under the acts of October 2, 1888, and August 30, 1890, fall within the exterior limits of a national forest subsequently created does not in anywise change their status of reserved reservoir lands, or render them subject to appropriation under section 4 of the act of February 1, 1905, granting rights of way for the construction and maintenance of dams, reservoirs, etc., for municipal and mining purposes, within and across forest reserves of the United States. . . . 31

11. A water-right permit issued by the State of Wyoming to an applicant for right of way for reservoir, canal, or ditch easement under the act of March 3, 1891, qualified by indorsement thereon that the waters of the stream from which he proposes to secure his water supply is already largely appropriated and that "the issuance of this permit grants only the right to divert and use the surplus or waste waters of the stream, and confers no rights which will interfere with or impair the use of water by prior appropriators," does not constitute a prima facie showing of right to appropriate sufficient water to utilize the grant, in contemplation of departmental regulations, and the applicant will be required to furnish other satisfactory prima facie evidence showing that he will be able to control, through diversion or storage, sufficient water to utilize the grant desired. 10

POWER PURPOSES.

12. Regulations of January 6, 1913, governing rights of way for electrical power transmission lines. 454

13. Right of way granted to Great Falls Power Co., under the act of March 4, 1911, for electrical power transmission lines. 460, 471

14. Regulations of August 24, 1912, concerning rights of way for power purposes through public lands and reservations (except National Forests). 150

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POWER PURPOSES—Continued.

16. Special rules governing protests against applications for permits for development, transmission, and use of power. 590

17. All projects wherein the power possibilities are such as to constitute the main factor of value should be made the subject of permits under the act of February 15, 1901, and the regulations thereunder rather than of easements under the acts of March 3, 1891, and May 11, 1898. 524

18. The authority to construct a dam across the Pend d'Oreille River conferred upon the Pend d'Oreille Development Co. by the acts of February 25, 1907, and May 20, 1912, extends only to the jurisdictional interest of the United States in the navigable waters and does not dispose of any property rights of the Government in the public lands; and the plans and specifications for construction of the dam submitted to the Secretary of War for approval, which indicate the use of lands of the United States within Kaniksu National Forest and power-site reserve No. 72, should not be approved until permits for use of the lands shall have been secured from both the Secretary of Agriculture and the Secretary of the Interior under the act of February 15, 1901. 413

PIPE LINES.

19. The grants of rights of way contained in the act of March 3, 1891, as amended by the act of May 11, 1898, are limited to "ditches, canals, or reservoirs," and should not be extended to include a conduit wherein water flows under pressure, as in a pipe line, unless it is a mere incidental connecting link in a conduit wherein water flows, as in a canal or ditch, as for example a culvert or an inverted siphon to carry an irrigating ditch past a stream. 138

20. Applications for rights of way for pipe lines should be made under the act of February 15, 1901, which act specifically authorizes the Secretary of the Interior to permit the use of rights of way for "pipes and pipe lines, flumes, tunnels, or other water conduits" 138

School Land.

1. A State will not be permitted to make a second school indemnity selection during the pendency of a prior selection based upon the same loss, and thus segregate two tracts upon a single base. 135

2. The grant of sections 16 and 36 made to the State of Washington by the act of February 22, 1889, was prior to survey of the land in compact only—an executory agreement; and until survey it was competent for the Congress of the United States to make other disposition of the land. 621

3. The State of Washington acquires no vested right or title under the grant of sections 16 and 36 made to said State, for school purposes, by the act of February 22, 1889, until said sections have been identified by survey; and, by virtue of section 2275 of the Revised

School Land—Continued.

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Statutes, as amended by the act of February 28, 1891, a bona fide settlement upon a section 16 or 36, existing at the date of such identification, excepts the land covered thereby from the operation of the grant. 621

4. By an erroneous attempt to sell lands in a school section while embraced in a reservation, the State does not, where it subsequently clears the apparent cloud on the title, forfeit its right to make indemnity selection of other lands in lieu thereof; but in such case it will be required to show that the land is in the same condition as it was at the date of its attempted conveyance. 259

5. Sections 13, 16, 33, and 36 in the so-called pasture and wood reserves are subject to disposition for the benefit of the Indians under the provisions of the act of Congress of March 3, 1911, and did not pass to the State of Oklahoma under its school grant, which must be satisfied, so far as these lands are concerned, under the indemnity provisions of the act of June 6, 1900. 433

6. Title to lands granted for school purposes does not pass to the State until identified by survey, and if at that time included in a reservation, title does not pass until the reservation is vacated and the land restored to the public domain, prior to which event the right of the State is merely expectant, or inchoate, and it has no right or title to assign or convey. 259

7. No title is acquired under or by virtue of a school indemnity selection until the same has been approved by the Secretary of the Interior; and where the lands embraced in a selection are classified as oil lands and withdrawn under the provisions of the act of June 25, 1910, the Secretary is without authority to approve the selection in the face of such withdrawal; but it should be rejected, without prejudice to the right of the State to submit showing with a view to securing reclassification of the lands and to apply anew therefor in event of their restoration. 592

Settlement.

1. Settlement, residence, and improvement upon a tract of unsurveyed public land confer no such right upon the settler as will prevent withdrawal thereof by the Government for a public purpose. 627

2. The fact that occupancy of a settlement claim, lawfully initiated, is interrupted by order of a court does not operate as a termination or abandonment of the settlement claim. 430

3. While homestead entrymen have sometimes been allowed credit for constructive residence during absences due to official employment, such absences have never been recognized as residence on mere settlement claims prior to entry. 430

4. The preferential right of entry conferred upon homestead settlers by section 3 of the act of May 14, 1880, is a personal privilege which can not be transferred to another; and no such right is acquired by an attempted

Settlement—Continued.

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purchase of a settlement claim as will defeat the rights of an intervening settler. 430

5. Prior to the act of August 9, 1912, a settlement right to unsurveyed land could not attach to more than 160 acres; and one claiming a larger area by virtue of settlement on unsurveyed land prior to that date will be required to elect which part, not exceeding 160 acres, he will retain and enter. 316

6. The rule that protects a settler upon one subdivision of a quarter-section against encroachment by others upon any portion of that quarter-section, based upon the doctrine of notice imparted by the settlement, has no application where two persons made simultaneous settlements upon the same quarter-section at the time of the opening of the land at midnight; but in such case the land may be divided between the parties. 173

7. Where an alien settler declared his intention to become a citizen of the United States on the same day he filed his application to make homestead entry for the land settled upon, the Land Department will not inquire as to the particular hour of the day such declaration was made, with a view to ascertaining whether it was prior or subsequent to the hour of filing of the application to enter. . 316

8. Where by inadvertent action of the Land Department in issuing patent to a railway company for a tract of land embraced in a settlement claim the remaining tracts embraced in the settlement claim are rendered noncontiguous, the settler may be permitted to make entry of the remaining tracts notwithstanding their noncontiguity with the view of submitting the entry to the Board of Equitable Adjudication for confirmation. . 375

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1. While the rules of *res judicata* and *stare decisis* should be considered and respected by the Secretary of the Interior, he is not precluded thereby from taking proper action in any matter remaining subject to his jurisdiction. 384

Statutes.

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1. Where there is a discrepancy between the printed statutes and the enrolled act the latter will control. 571

2. As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had been so enacted at the beginning. 176

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Swamp Lands.

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2. Lands ceded to the United States by the Comanche, Kiowa, and Apache tribes of Indians, and, by the act of June 6, 1900, made subject to disposal under the general provisions of the homestead, town-site, and mining laws, are not subject to disposal under the timber and stone act..... 132
3. Section 1 of the act of March 3, 1911, authorizing the reinstatement of homestead entries canceled or relinquished because of the erroneous allowance of such entries after the withdrawal of lands for national forest purposes, makes no provision for the reinstatement of canceled timber and stone entries... 261

Timber Cutting.See *Alaska Lands*, 4.**Town Lots.**

1. A foreign corporation authorized to do business within the State of Montana, and empowered by its charter and the laws of that State to hold real estate, and which has improved and is in possession of and conducting its business upon town lots within the town site of Poplar, in that State, is qualified within the meaning of section 14 of the act of May 30, 1908, so far as the requirement of residence is concerned, to make entry of such lots under and in accordance with the provisions of that section..... 331

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Water Right.

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1. Under the statutes of Colorado, prior appropriation of water from a river gives the appropriator a right to only so much of the natural flow of the river as is applied by him to beneficial uses, and does not entitle him to have the natural flow of the river maintained in order that the amount of water appropriated by him shall continue available under the particular method adopted by him to carry it to the land upon which it is used; and so long as sufficient water is left in the river to meet the prior appropriation and beneficial use, the prior appropriator can not lawfully or equitably complain of the diversion of other waters of the river through appropriation and beneficial use, even though such appropriation and diversion should so lower the level of the river as to necessitate the adoption by him of other methods of transferring the water appropriated by him from the river to the lands upon which it is used..... 399

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